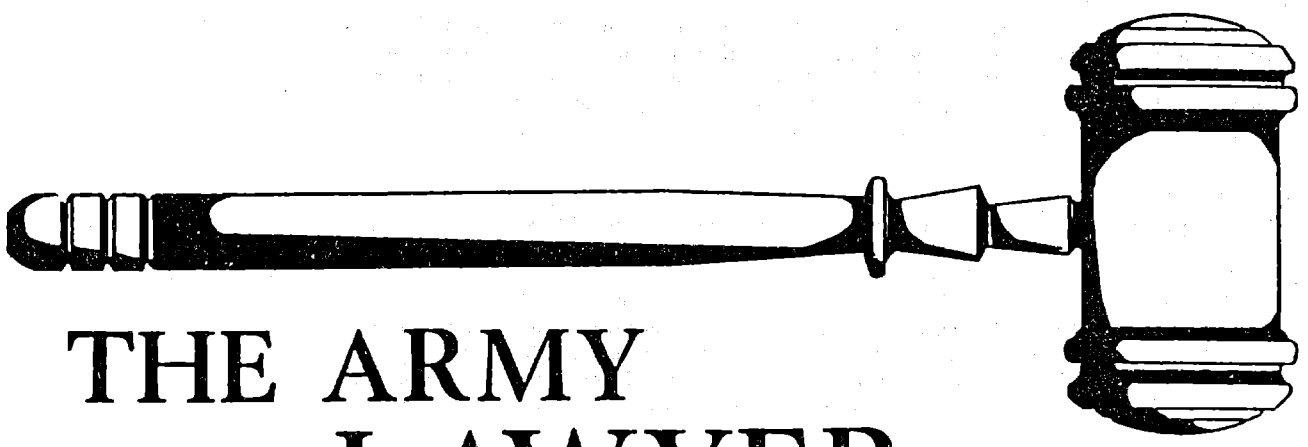

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Table of Contents

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The NATO Status of Forces Agreement and the Supplementary Agreement

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*Editor's Note — On 28 August 1988, the collision of three Italian stunt planes during a military airshow at the United States Air Base in Ramstein, Germany, killed 70 spectators. On 8 December 1988, the crash of an American A10 "Thunderbolt" during a low altitude training flight over a residential area near Remsheid, Germany, killed five people. In each case, NATO appointed an inquiry commission to determine the cause of the crash and to recommend corrective actions. As the author indicates, both of these military aircraft disasters, as well as NATO's control over the investigative and remedial activities that occurred in their wake, caused many German citizens and officials to criticize the allied forces' presence in Germany and to question the authority of NATO—rather than the German federal government—to exercise control over these situations.**

Ever since the two tragic accidents at Ramstein and Remscheid last year a debate has developed in the Federal Republic of Germany concerning the NATO Status of Forces Agreement[1] and the Supplementary Agreement[2] thereto, particularly in the media and among the general public. Interested parties have asked questions about whether or not these two agreements are still appropriate for the times, whether or not the Federal Republic of Germany is a sovereign state, and whether or not this country is still subject to law imposed by the former occupying powers. The following article contains some comments concerning this matter.

The NATO Status of Forces Agreement

The "Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of their Forces" of 19 June 1951, referred to briefly as the "NATO Status of Forces Agreement" (SOFA), is valid law in all NATO countries. The "Agreement to Supplement the Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of their Forces with Respect to Foreign Forces Stationed in the Federal Republic of Germany" of 3 August 1959, referred to briefly as the "Supplementary Agreement" (SA), regulates the specific rights and obligations of the allied forces stationed in the Federal Republic of Germany. The Federal Republic of Germany acceded to both agreements by statute on 18 August 1961.[3]

SOFA regulates the status of the armed forces of a NATO member state that are stationed within the territory of another member state in the interests of the common defense. SOFA not only constitutes the foundation for the status of forces present in the territory of the Federal Republic of Germany, but it is also the foundation for the status of the members of the German Federal Armed Forces who are present in other NATO countries. Because SOFA consists only of general provisions that other agreements complement and supplement—agreements concluded directly between the respective participating states—SOFA facilitates a flexible application of its terms in accordance with its signatories' respective national requirements and interests.

One important provision of SOFA is article II, which establishes a duty upon the force of a state, upon that force's civilian component, and upon the force's accompanying dependents, to respect the law of the receiving state and to abstain from any activity inconsistent with the spirit of the agreement. In particular, these parties must abstain from any political activity in the receiving state. The sending state has the duty to take the necessary measures to ensure that its citizens abide by those duties. Article II, therefore, contains an obligation to take measures that are more than mere efforts. In the context of the Ramstein and Remscheid accidents mentioned above, both the media and the general public misunderstood the significance of this duty. The expression "duty" appears in two separate places within the text of SOFA, article II. Moreover, in the same manner as the agencies of the allied forces who are stationed in the Federal Republic of Germany are obligated to respect the German law, so the German Federal Armed Forces troops who are stationed in El Paso, Texas, USA; in Castlemartin in Great Britain; or in Shilo, Canada; are obligated to respect the United States, British, or Canadian laws. The authorities of these receiving states have never left any doubt that this is in

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* *See* Washington Post, Dec. 8, 1988, at A1, col. 4; *id.*, Oct 25, 1988, at A24, col. 2.

[1] Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of their Forces, June 19, 1951, 4 U.S.T. 1792, T.I.A.S. No. 2846, 199 U.N.T.S. 67 [hereinafter SOFA].

[2] Agreement to Supplement the Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of their Forces with Respect to Foreign Forces stationed in the Federal Republic of Germany, with Protocol of Signature, Aug. 3, 1959, 14 U.S.T. 531, T.I.A.S. No. 5351, 481 U.N.T.S. 262 [hereinafter SA].

[3] The NATO SOFA and SA have been in force in the Federal Republic of Germany since 1 July 1963. *See* Bundesgesetzblatt [BGBl] 1963 II S. 745.

fact the case. According to the newspaper articles about the accidents at Ramstein and Remscheid, however, one could easily gain the impression that the provision concerning the obligation to respect the law of the receiving state—in this case the law of the Federal Republic of Germany—was not a part of the NATO SOFA, but rather merely a clause in the SA to encourage the allied forces to undertake such efforts. This impression is the reason why in many instances misunderstandings did occur. Among those misunderstandings were misconceptions and misinterpretations that even culminated in the assertion that the Federal Republic of Germany is a country with a restricted sovereignty, and that the "special rights and privileges" of the former occupying powers still existed.

SOFA, article VII, governs the exercise of jurisdiction over members of the armed forces of the sending states. In accordance with paragraph 3(a)(ii) of article VII, the competent authorities of a sending state have the primary right to exercise jurisdiction over a member of their forces in relation to any offense arising out of any act or omission: 1) that occurred in the performance of an official duty—as could have been the case at Remscheid—and 2) that is punishable according to the laws of both the sending state and the receiving state. However, the primary right to exercise jurisdiction does not exclude an investigation by the authorities of the receiving state.

In accordance with SOFA, article VII, paragraph 3(c), sentence 2, however, the judicial authorities of the receiving state have the option of requesting the authorities of the sending state to waive their primary right to exercise jurisdiction over a matter. The authorities of the sending state must give sympathetic consideration to such a request if the authorities of the receiving state consider a waiver to be of particular importance. In the preparations for making an appropriate decision in this regard, the authorities of the receiving state also have the option of conducting the investigations required to make a proper decision on the waiver issue. Of course, the receiving state's ability to conduct an investigation also is necessary to make a requisite determination as to whether a certain member of the armed forces of a sending state was involved in a particular offense. In addition, the authorities of the parties to the agreement are obligated to notify one another of the disposition of all cases that involve concurrent rights to exercise jurisdiction under SOFA, article VII, paragraph 6(b).

Moreover, the primary right to exercise jurisdiction, which is granted to the armed forces of the sending state in accordance with SOFA, article VII, paragraph 3(a), excludes prosecution in a court of the receiving state only if the proceedings conducted by the armed forces of the sending state conclude with a court decision.[4] Therefore, a nonjudicial decision, such as the imposition of nonjudicial punishment, a reprimand, an admonition, or a mere decision by a superior authority not to prosecute, would not be a bar to prosecution by the authorities of the receiving state.

SOFA, article VII, thus constitutes a reasonable compromise between the conflicting interests of the sending state (the right to prosecute its own citizens) and of the receiving state (the right to prosecute on its own territory). The discussions by the media, the general public, and even the parliaments, concerning the Ramstein and Remscheid aircraft accidents demonstrated that these parties frequently misinterpret the legal significance of the SOFA. These misunderstandings prevailed in the case of the aircraft crash that occurred at Remscheid, despite the fact that an identical legal situation would have existed had a German aircraft crashed in the United States.

It is the view of all Alliance partners that the NATO SOFA has proven completely its worth for almost forty years now. No need exists for changing its provisions.

The Supplementary Agreement

The provisions of the Supplementary Agreement to the SOFA constitute a "compromise solution" between the frequently conflicting interests of the seven participating states, for nothing but a "compromise solution" could have achieved agreement on such a complex and difficult subject matter. What is special in this case, in comparison with the corresponding provisions contained in other international agreements, is essentially due to the particular German situation including the strength of the allied forces, the duration of their presence here, and the strategic threat to the territory of the Federal Republic of Germany.[5]

Article 82(c)(ii) of the SA provides for a review of the SA with respect to one or more of its provisions in the case that their continued application, in the view of the party making the request, would be especially burdensome to, or could not reasonably be expected of, that party. However, in view of the existing possibilities for the competent authorities of the Federal Republic of Germany to exercise legal influence on the allied forces stationed here, no apparent cause exists for either party to invoke this review process.

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[4] *Cf.* SOFA art. VII, para. 8.

[5] Memorandum to the NATO Status of Forces Agreement and to the Supplementary Agreements, Deutscher Bundestag, 3 Wahlperiode, Drucksache 2146, Anlage IV, 224-25.

The SA contains the instruments required by the German authorities for working properly with, and applying correctly, the individual provisions of the SOFA, while also observing the requirements of German national sovereignty and of existing German law. Thus, a mutual obligation exists between the German authorities and the authorities of the allied forces stationed in Germany to solve existing problems by means of close cooperation and possibly by the conclusion of administrative or other agreements.[6] In the event that in the implementation of the NATO SOFA and the SA the German authorities and the authorities of an allied force cannot reach agreement, either on a local or on a regional level, SA, article 3, paragraph 7, provides for the referral of the matter to the competent central German authority and to the corresponding higher authority of the particular allied force. If these higher authorities cannot settle a difference of opinion at their level, the German federal government may turn to the government of the sending state. Differences that the governments cannot settle by direct negotiation are referred to the North Atlantic Council.[7] As one can discern, the Federal Republic of Germany has never found a need to invoke these provisions to settle disputed matters.

Prerogatives of German Authorities

The following examples clarify the possibilities that exist for German authorities to exercise their prerogatives under the SOFA and the SA.

a. *Exercises of the Allied Forces in the Federal Republic of Germany.* SA, articles 45 and 46, grant to the stationed forces the right to conduct maneuvers and other exercises outside their accommodations and in the air as necessary to accomplish their defense mission and in accordance with the orders or recommendations that the Supreme Allied Commander, Europe, or any other competent authority of the North Atlantic Treaty Organization may issue. In principle, however, German law governs the exercise of these rights.[8]

SA article 45, paragraph 5, and the Agreement to Implement Paragraph 5 of Article 45 of the Supplementary Agreement, dated 3 August 1959,[9] regulate the cooperation between the stationed forces and the German authorities in the planning and implementation of maneuvers. Accordingly, the authorities of the allied forces stationed in Germany are obligated to communicate implementation plans to the German authorities prior to each maneuver or other training exercise. Those plans must conform to the implementation agreement between the particular allied force conducting the maneuver or exercise and the German government. The allied force must communicate the plans on time; that is, it must observe certain minimum deadlines. To reach agreement on maneuver and exercise plans, the authorities of the stationed forces and the German authorities at the local or the regional level conduct joint discussions. In the event that these authorities cannot reach an agreement within an appropriate period of time, the German federal government and the government of the sending state will conduct negotiations. Only after these discussions on the local or regional level or the negotiations between the governments have resulted in an agreement is the conduct of exercises and maneuvers permissible for the allied forces; and even then, of course, these exercises and maneuvers must adhere strictly to the terms of the agreement achieved concerning the plan. This provision derives from the basic idea that all problems connected with the exercises of the allied forces stationed in Germany should reach a resolution through joint discussions in the spirit of the Alliance, and that the parties in every case should be able to find some solution that takes into consideration the legitimate interests of both sides. From a legal perspective, this arrangement and the spirit upon which it rests ensure an appropriate measure of participation on the part of the German civil authorities.

b. *Security Provided by Members of the Allied Forces at Scenes of Accidents.* In accordance with SOFA, article VII, paragraph 10, the allied forces have the right to police *only* the camps, establishments, and other premises that they occupy as the result of an agreement with the receiving state. The allied forces do not have any independent responsibility to maintain public safety and order outside their premises. Outside their premises the military police of the allied forces may take only measures that are necessary to maintain discipline and order among their own forces.[10]

Any further authority, such as securing the scene of an accident involving a missile transport trailer or the site of a crash involving an aircraft, exists only within the scope of the right to exercise self-defense, which is available to any party. A party may invoke this right, however, only when necessary to protect the public from a present danger that the party cannot otherwise avert, or when the

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[6] *See* SA, art. 3.

[7] *See* SOFA, art XVI.

[8] *See* SA, art. 45, para. 1, sent. 2; SA, art. 46, para. 1, sent. 2.

[9] Agreement to Implement Paragraph 5 of Article 45 of the Agreement to Supplement the Agreement Between the Parties to the North Atlantic Treaty regarding the Status of Their Forces Stationed in the Federal Republic of Germany, Aug. 3, 1959, 14 U.S.T. 686, T.I.A.S. No. 5351, 481 U.N.T.S. 591; *see* Bundesgesetzblatt [BGBl] 1961 II S. 1955.

[10] *See* SOFA, art. VII, para. 10(b); SA, art. 28.

German security forces who properly would be responsible are not yet present at a scene or in a position to intervene. Unfortunately, in practice the parties frequently fail to recognize fully these exigent provisions. In this regard the responsible ministers of the interior for the individual German states should issue clear directives to their respective police forces. Neither the NATO SOFA, nor the SA, for example, would allow the military police of the allied forces to close an autobahn after an accident involving a vehicle of these forces.

c. *Transfer of Buildings and Grounds to the Stationed Forces.* The parties shall satisfy the accommodation requirements of a force only in accordance with the provisions of SOFA, article IX, and SA, article 48. German authorities and authorities of the allied forces must enter into agreements with respect to accommodations for newly transferred allied forces and to accommodations already in use by allied forces since the occupation period. These written agreements are to contain data concerning size, type, location, condition, and equipment of the accommodation, as well as details concerning its use.[11] Transfer agreements allow authorities to accommodate German requirements, such as terms concerning the permissible extent to which German forces may use an accommodation or facility.

d. *Right of Access to Allied Accommodations.* In accordance with SA, article 53, paragraph 1, whenever German authorities have made accommodations available for the exclusive use of the allied forces, those forces shall have the right to take by themselves all those measures that they consider necessary for the satisfactory fulfillment of their defense responsibilities. In the fields of public safety and public order, the allied forces may apply their own regulations when they prescribe standards equal to or higher than those prescribed in German law. The SA thus ensures the observance of German law in these fields by providing that the allied forces, in the application of their own regulations, have to take German law into account as the minimum standard. Moreover, the allied forces must ensure that the German authorities are allowed to take measures within the accommodation as necessary to safeguard German interests.[12] These measures may include the right of access to the accommodation of the stationed forces for representatives of competent German authorities. When such German authorities exercise a right to access, however, they must respect the requirements of military security just as they must do so in the case of facilities of the German Federal Armed Forces.

Outside the fields of public safety and public order, German law prevails. Deficiencies in security that may arise will in principle be the subject of joint consultations in which experts from both parties will participate. If the parties to these consultations find that any measures are necessary to rectify security deficiencies, they will direct their respective forces to take those measures. SA, article 53, paragraph 4, in conjunction with the Signature Protocol[13] to article 53, paragraphs 5 to 7, regulates the details of the cooperation between the German authorities and the allied forces. Thus, the SA ensures that the allied forces must comply with any justified requests on the part of the German authorities to safeguard the German interests within their accommodation.

e. *Road Traffic Regulations.* SA, article 57, paragraph 1, grants to the stationed forces the right to move within the German federal territory in their own vehicles. The stationed forces may decide on their own which type of travel they use in consideration of their military requirements. SA, article 57, paragraph 3, however, expressly establishes that in principle the German traffic regulations in the widest sense of their terms shall apply, to include administrative directives concerning traffic. Therefore, the allied forces are subject in particular to the provisions of the German Road Traffic Regulations, which require permission for the excessive use of the roads by convoys and large-capacity or outsized vehicles. Accordingly, in principle, the German Road Traffic Regulations apply to the allied forces, both in general and also during the conduct of exercises. The allied forces are permitted to deviate from the German regulations governing conduct in road traffic only in cases of military exigency, and then only by giving due regard to public safety and public order.

The German Road Traffic Regulations particularly include the provisions of the German Ordinance on the Road Transport of Dangerous Goods (GGVS). In the road transport of dangerous goods in their own vehicles, the allied forces may apply their own safety regulations when those regulations prescribe standards equal to or higher than the ones prescribed by the GGVS. Implicitly, the allied forces must therefore apply the GGVS if their own regulations prescribe lesser standards. These provisions ensure that the allied forces must take into account as a minimum safety standard the German safety regulations for the transport of hazardous goods.

In addition, of particular significance are the provisions contained in SA, article 57, paragraph 4(b), which

[11] SA, art. 48, para. 3.

[12] *Id.* at art. 53, para. 3.

[13] *See* SA, *supra* note 2.

correspond with the regulations that apply to the Federal Armed Forces in accordance with paragraph 35 of the German Road Traffic Regulations. These provisions of the SA restrict military transport, which involves motor vehicles and motor vehicle trailers whose size, axle load, and gross weight exceed the limitations of the German Road Traffic Regulations, to a road network agreed upon by the authorities of the stationed forces and the German federal government. These restrictions also apply to movements involving convoys containing a number of vehicles in excess of the number permitted by the German Road Traffic Regulations. These restrictions are necessary to improve road traffic safety and to avoid, as much as possible, damage to large portions of the road network that are not suitable for such traffic.

To secure the protection of the roads and a smooth traffic flow to the maximum possible extent, the road network agreements also contain certain conditions for the use of the roads in the network itself. Regulating allied force military traffic in the network, in particular, enhances the manner and extent of cooperation between the authorities of the stationed forces and the German road traffic and road construction authorities.

Outside of the agreed road network, transport involving excessively heavy vehicles or convoys is permissible only when exceptional circumstances arise, such as accidents, disasters, and states of emergency. In all other cases, transport outside of the prescribed road network may occur only when permitted by agreement between the authorities of the stationed forces and the German authorities. Consequently, the regulation of allied forces' military traffic on German roads constitutes another example of a careful balancing of the interests and "sovereignty" between the nations involved in the SA.

f. *Vehicle standards.* In addition to the provisions relating to traffic regulations, SA, article 57, paragraph 5, addresses the construction, design, and equipment of vehicles used by the allied forces. Generally, German vehicular design regulations do not apply to military vehicles used by the allied forces. Allied forces must, however, pay due regard to German public safety and order outside of their appropriate accommodations. Therefore, this provision of the SA implies that allied forces must take additional measures if the regulations of the sending state are insufficient to ensure that their vehicles comport to an acceptable degree of safety when operated under the road conditions present in the Federal Republic of Germany.

The Effect of the SOFA and the SA on German Sovereignty

In connection with the issues mentioned above, the media and the general public have expressed some doubts concerning the sovereignty of the Federal Republic of Germany. These doubts, however, actually are unfounded because on 5 May 1955, the Federal Republic of Germany obtained the full authority of a sovereign state. While the Bonn Convention,[14] article 2, and article 4, paragraph 2, allowed the Three Powers to retain certain rights and responsibilities relating to Berlin and to Germany as a whole, those provisions did not affect the sovereignty of the Federal Republic of Germany. Rather, those provisions refer exclusively to the maintenance of the joint responsibility of the Three Powers for the reunification of Germany and for a peace settlement—the same interests as those espoused by the Federal Republic of Germany. As a consequence, when they entered into the Bonn Convention, the Three Powers declared, vis-a-vis the Federal Republic of Germany, that they would not interpret this provision as permitting them to affect adversely the relations established between themselves and the Federal Republic of Germany. Furthermore, the governments of the Three Powers agreed that they would not interpret the Bonn Convention as permitting them to derogate from their undertakings to the Federal Republic of Germany under the signed conventions. These agreements concerning the nature of the Bonn Convention imply that the reservations that the Three Powers expressed do not give them any authority vis-a-vis the Federal Republic of Germany that would contradict the abrogation of the occupation regime or the sovereignty of the Federal Republic of Germany. Consequently, the sovereignty of the Federal Republic of Germany actually is not restricted.

Conclusion

In summary, the existing treaties and agreements do not give the allied armed forces any rights that would be incompatible with the sovereignty of the Federal Republic of Germany. Although, as in all areas of international law, violations occasionally occur in individual cases, the allied forces continuously have demonstrated that they take very seriously their responsibilities under the SOFA and the SA.

[14]Convention on Relations Between the Three Powers and the Federal Republic of Germany, version of Oct. 23, 1954; *see* Bundesgesetzblatt [BGBl] 1955 II S. 305.

Who Pays the Piper for Attorneys' Fee Awards in GSBCA Bid Protest Cases?—The Case of *Julie Research Laboratories, Inc.*

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Introduction

Protesters challenging federal agency procurements of computers and computer-related services before the General Services Administration Board of Contract Appeals (GSBCA or the board) potentially face enormous bills for attorneys' fees.[1] However, government settlements that agree to pay some or all protest costs,[2] or the award of attorneys' fees by the GSBCA to prevailing protesters[3] frequently mitigate the sting from these bills. Unlike fees paid pursuant to settlements, which normally come from agency appropriations for the procurement at issue, the government pays awards by the GSBCA from the permanent indefinite judgment fund (judgment fund)[4]—a source of funds provided by Congress to satisfy judgments and other monetary awards against the United States. Agencies often adhere to a practice of seeking GSBCA approval of settlement agreements involving attorneys' fees and other protest costs, converting the agreements into awards. This practice generally allows the agency to avoid having the settlement costs charged to agency appropriations.[5] Concern that this loophole is allowing agencies to reach agreements with protesters to pay fees out of someone else's pocket produced a questionable response from the GSBCA to halt this agency practice; the board's solution, however, was to redirect the expenditure of public funds to correct perceived abuses through orders that themselves were contrary to law.

In *Julie Research Laboratories, Inc.* (*Julie Laboratories*),[6] the board issued one of its most significant decisions in recent years[7] by directing the Army to reimburse the judgment fund for the protest costs, including attorneys' fees, awarded to a successful protester.[8] The GSBCA found reimbursement consistent with its "responsibility to 'accord due weight to the policies of [the Brooks Act] and the goals of economic and efficient

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[1] *See* Long, *What Will it Profit Thee?—Recent Decisions by the GSBCA Concerning Protest and Bid Preparation Costs*, The Army Lawyer, Oct. 1989, at 24. Bills upward of $100,000 are common and occasionally bills have risen in excess of $500,000. Fees for GSBCA protests are so high because these proceedings involve complete trials, including discovery, hearings, and post-trial briefs, all occurring within the extremely brief period of about six weeks. *Id.*

[2] *Id.* at 26.

[3] *See* 40 U.S.C. § 759(f)(5)(C) (Supp. V 1987):

> Whenever the board makes [a determination that a challenged agency action violates a statute or regulation or the conditions of any delegation of procurement authority], it may, in accordance with section 1304 of Title 31, further declare an appropriate interested party to be entitled to the costs of—
>
> (i) filing and pursuing the protest, including reasonable attorney's fees, and
>
> (ii) bid and proposal preparation.

[4] 31 U.S.C. § 1304 (1982). This section provides in part:

> (a) Necessary amounts are appropriated to pay final judgments, awards, compromise settlements, and interest and costs specified in the judgments or otherwise authorized by law when—
>
> (1) payment is not otherwise provided for;
>
> (2) payment is certified by the Comptroller General; and
>
> (3) the judgment, award, or settlement is payable— ...
>
> (C) under a decision of a board of contract appeals ....

[5] *See* Long, *supra* note 1, at 26.

[6] GSBCA No. 9075-C (8919-P), 89-1 BCA ¶ 21,213, *dismissed on appeal*, 881 F.2d 1067 (Fed. Cir. 1989). *But see* Memorandum for William J. Haynes, II, General Counsel, Department of the Army, re: Authority of the General Services Board of Contract Appeals to Order Reimbursement of Permanent Judgment Fund for Awards of Bid Protest Costs (May 25, 1990) [hereinafter Haynes Memorandum].

[7] McCann, Norsworthy, Ackley, Aguirre, Mellies, & Munns, *Recent Developments in Contract Law—1988 in Review*, The Army Lawyer, Feb. 1989, at 19.

[8] 89-1 BCA ¶ 21,213, at 107,021. The board imposed the requirement to reimburse the judgement fund through its power to amend the delegation of procurement authority, granted from the Administrator of the General Services Administration to the procuring agency, which was applicable to the challenged procurement. *See* 40 U.S.C. § 759(f)(5)(B) (Supp. V 1987).

procurement....'"[9] This decision impacted upon other agencies in subsequent board decisions,[10] and set off a heated controversy within the executive department. The propriety of the board's order to reimburse the judgment fund later appeared before the Justice Department on review,[11] but in the meantime the order presented a dilemma to agency disbursing officials directed to reimburse the judgment fund for awards of attorneys' fees and other protest costs.

Background

The Julie Laboratories *Protest*

The protest in *Julie Laboratories* initially focused on alleged defects in a solicitation issued by the Army Missile Command that, in the protester's view, impermissibly prevented it from competing for the award of a contract. The GSBCA found merit in some of the protest grounds, and required the Army to permit the protester to compete under a revised solicitation.[12]

Subsequently, the same protester sought attorneys' fees and other costs from the board to reimburse it for expenses incurred in its earlier effort to gain the opportunity to compete for the Missile Command contract. Noting that the protester had failed on several of its protest grounds the board nevertheless found it to be a prevailing party, and awarded it $20,986 of the claimed $25,755 in costs incurred in the earlier protest.[13] If the decision had stopped at this point, it undoubtedly would have produced little controversy; the board went on, however, to require reimbursement of the judgment fund for the fees awarded from agency procurement appropriations.[14]

Awards of Attorneys' Fees—Operation of Authorizing Statutes Before Julie Laboratories

When hearing contract disputes rather than bid protests, the GSBCA clearly has the authority to order reimbursement of the judgment fund for any attorneys' fees awarded to a successful contractor. Under the Contract Disputes Act (CDA),[15] the agency must repay from its own appropriations any award of attorneys' fees paid from the judgment fund.[16] The CDA, however, does not govern the conduct of bid protests at the GSBCA;[17] instead, the GSBCA governs bid protests under its own bid protest authority, which Congress established under the Competition in Contracting Act (CICA).[18] The CICA is a completely independent legislative enactment that did not incorporate the reimbursement provisions of the CDA.[19]

Potential contractors that successfully protest agency solicitations or contract award decisions to the General

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[9] 89-1 BCA ¶ 21,213, at 107,021 (quoting 40 U.S.C. § 759(h)(5)(A) (Supp. III 1985) (recodified at 40 U.S.C. § 759(f)(5)(A) (Supp. V 1987)). The Brooks Act placed responsibility for all federal government procurement of computers and computer services with the Administrator of the General Services Administration. Pub. L. No. 89-306, 79 Stat. 1127 (1965) (codified as amended at 40 U.S.C. § 759(a), (b), (e) (1982 & Supp. V 1987)). Originally the GSBCA had authority over only contract disputes, but Congress extended its authority to bid protests as well by the Competition in Contracting Act of 1984, Pub. L. No. 98-369, 98 Stat. 1175, 1183 (1984) (codified as amended in scattered sections of titles 10, 31, 40, and 41 U.S.C. (1982 & Supp. V 1987)). Although Congress originally enacted the GSBCA's bid protest authority as a three-year experiment, Congress made it permanent in the Paperwork Reduction and Reauthorization Act of 1986, Pub. L. Nos. 99-500, 99-591, 100 Stat. 1783-335, 3341-435 (1986).

[10] *See, e.g.*, Berkshire Computer Prods., GSBCA No. 10452-C (10338-P) (9 Feb. 1990) (Department of the Navy); TTK Assocs., GSBCA No. 10223-C (10071-P) (18 Dec. 1989) (Department of the Interior); InSyst Corp., GSBCA No. 10143-C (10032-P) (21 Nov. 1989) (Defense Communications Agency); Digital Equip. Corp., GSBCA No. 9285-C(9131-P), 89-3 BCA ¶ 22,181 (Department of the Air Force); Wang Laboratories, Inc., GSBCA No. 9288-C(9131-P), 89-3 BCA 22,180 (Department of the Air Force).

[11] *See* Letter, Office of The Judge Advocate General, U.S. Army, subject: Request for the Opinion of the Office of Legal Counsel, Department of Justice, 30 Jan. 1990 (requesting Department of Justice's Office of Legal Counsel to review GSBCA's order under its authority, delegated from the President, to resolve disputes between executive agencies); *see also* Haynes Memorandum, *supra* note 6. The Army originally appealed the GSBCA's decision to the United States Court of Appeals for the Federal Circuit (Federal Circuit), but the court dismissed the appeal as a nonjusticiable, intragovernmental dispute. United States v. Julie Research Laboratories, Inc., 881 F.2d 1067 (Fed. Cir. 1989).

[12] Julie Research Laboratories, Inc., GSBCA No. 8919-P, 87-2 BCA ¶ 19,919, *modified in part*, GSBCA No. 8919-P-R, 87-3 BCA ¶ 20,020.

[13] 89-1 BCA ¶ 21,213, at 107,020-21. The board explained its reduction from the amount claimed to the amount awarded as an adjustment to reflect a reasonable relationship between the award and the success obtained by the protester. *Id.* A protester must be a "prevailing" party to recover attorney's fees—a requirement that the courts interpret in light of the degree of success the protester achieves in pursuing his claim. *See* Hensley v. Eckerhart, 461 U.S. 424 (1983); *see also* Texas State Teachers Ass'n v. Garland Indep. School Dist., 103 L. Ed. 2d 886, 887 (1989) (plaintiff crosses threshold to fee award of some kind if plaintiff succeeds on any significant issue that achieves some of the benefit sought in bringing suit).

[14] 89-1 BCA ¶ 21,213, at 107,021.

[15] Pub. L. No. 95-563, 92 Stat. 2383, 2389 (1978) (codified as amended at 41 U.S.C. §§ 601-13 (1982 & Supp. V 1987).

[16] *See* 41 U.S.C. § 612(c) (1982). "Payments made [from the judgment fund pursuant to the order of an agency board of contract appeals] shall be reimbursed to the [judgment fund] by the agency whose appropriations were used for the contract out of available funds or by obtaining additional appropriations for such purposes." *Id.*

[17] The GSBCA has no bid protest authority under the CDA. *See* Coastal Corp. v. United States, 713 F.2d 728, 730-31 (Fed. Cir. 1983).

[18] *See* sources cited *supra* note 9.

[19] 89-1 BCA ¶ 21,213, at 107,021 (Borwick, A.L.J., concurring in part and dissenting in part).

Accounting Office (GAO)[20]—rather than to the GSBCA—receive attorneys' fee awards through payments directly from agency appropriations.[21] Interestingly, the CICA, the same legislation that created bid protest jurisdiction in the GSBCA without provision for reimbursement of the judgment fund, also established the GAO's authority to award attorneys' fees, including the requirement that the agency pay the fees from its own appropriations.[22]

Within the United States Code section that permanently appropriates monies for the judgment fund, a provision exists that requires reimbursement of the fund for awards made from it for the benefit of certain federal entities.[23] These entities, however, are commercial activities of federal agencies; the judgment fund itself does not make reimbursement a general requirement for agencies acting in their governmental capacities.[24] Other statutory provisions like the CDA may require reimbursement by agencies in certain circumstances, but these are inapplicable in GSBCA bid protests.[25]

Prior to the *Julie Laboratories* decision, the GSBCA frequently awarded attorneys' fees in protest cases without construing its authority under the Brooks Act to permit it to order reimbursement of the judgment fund.[26] The board simply awarded the amounts deemed appropriate and directed payment from the judgment fund.[27] In *Julie Laboratories*, however, the board departed from its own prior practice by ordering the Army to reimburse the judgment fund. Then, to justify its reimbursement order, it cited the goals of economic and efficient procurement, and declared that the attorneys' fees awarded were connected inextricably with the true economic cost of the procurement.[28] The board gave no lucid explanation for its abrupt departure from its own precedent; instead, it added a measure of fiscal uncertainty to every agency protest case that appeared before the GSBCA in the months immediately following its *Julie Laboratories* decision.

Analysis of the *Julie Laboratories* Decision

Insights from the Progeny

Subsequent to its *Julie Laboratories* decision, the GSBCA has continued to award attorneys' fees in bid protest cases, but it has been inconsistent in requiring agency reimbursement of awards made from the judgment fund.[29] Compounding the inconsistency is the lack of any guidance from the board concerning the standards it applies in distinguishing cases that are appropriate for a

[20] Under the CICA, GAO protest jurisdiction is concurrent with the GSBCA's protest jurisdiction over computer acquisitions. A party's election of one forum, however, bars a simultaneous or subsequent protest to the other. *See* 40 U.S.C. § 759(f)(1) (Supp. V 1987) (a party protesting a procurement to the GAO may not protest the same procurement to the GSBCA); Norden Serv. Co., Comp. Gen. Dec. B-231575.2 (19 Aug. 1988), 88-2 CPD ¶ 161 (GAO will dismiss protest to GAO concerning same issues as protested to GSBCA in deference to binding effect of GSBCA decisions).

[21] 31 U.S.C. § 3554(c) (Supp. V 1987):

> (1) If the Comptroller General determines that a solicitation for a contract or a proposed award or the award of a contract does not comply with a statute or regulation, the Comptroller General may declare an appropriate interested party to be entitled to the costs of—
>
> (A) filing and pursuing the protest, including reasonable attorneys' fees; and
>
> (B) bid and proposal preparation.
>
> (2) Monetary awards to which a party is declared to be entitled under paragraph (1) of this subsection shall be paid promptly by the Federal agency concerned out of funds available to or for the use of the Federal agency for the procurement of property and services.

[22] *See* Competition in Contracting Act of 1984, Pub. L. No. 98-369, 98 Stat. 1175, 1183 (1984) (codified as amended in scattered sections of titles 10, 31, 40, and 41 U.S.C. (1982 & Supp. V 1987)); *see also* sources cited *supra* note 21.

[23] 31 U.S.C. § 1304(c) (1982) provides for reimbursement of the judgment fund for any judgments or settlements paid from the fund for disputes arising from contracts made by the Army and Air Force Exchange Service, the Navy Exchange, the Marine Corps Exchange, the Coast Guard Exchange, or the Exchange Councils of the National Aeronautics and Space Administration. The judgment fund does not itself mention a requirement for reimbursement under any other circumstances.

[24] *Id.*

[25] *See* 89-1 BCA ¶ 21,213, at 107,021 (Borwick, A.L.J., concurring in part and dissenting in part):

> There is nothing in the judgment fund statute directing agencies to reimburse the fund for this Board's award of the cost of filing and pursuing protests under the Brooks Act, nor does the Brooks Act incorporate the requirement of the CDA, 41 U.S.C. [§] 612(c) (1982), that agencies reimburse the payments of board judgments from the judgment fund.

[26] *See, e.g.*, Grammco Computer Sales, Inc., GSBCA No. 9049-C (8940-P), 88-2 BCA ¶ 20,691; Morton Management, Inc., GSBCA No. 8556-C(8419-P), 87-3 BCA ¶ 20,094.

[27] Previously, neither parties before the board, nor the board, sua sponte, apparently ever raised the issue of requiring reimbursement of the fund. *See* cases cited *supra* note 26.

[28] 89-1 BCA ¶ 21,213, at 107,021.

[29] *Compare* Berkshire Computer Prods., GSBCA No. 10452-C (10338-P) (9 Feb. 1990) (Navy procurement); TTK Assocs., GSBCA No. 10223-C (10071-P) (18 Dec. 1989) (Department of the Interior procurement); InSyst Corp., GSBCA No. 10143-C (10032-P) (21 Nov. 1989) (Defense Communications Agency procurement); Digital Equip. Corp., GSBCA No. 9285-C (9131-P), 89-3 BCA ¶ 22,181 (Air Force procurement); Wang Laboratories, Inc., GSBCA No. 9288-C(9131-P), 89-3 BCA ¶ 22,180 (Air Force procurement) (in each of these cases GSBCA ordered reimbursement of judgment fund for attorneys fees awarded) *with* HSQ Technology, Inc., GSBCA No. 10054-C(9985-P), 89-3 BCA ¶ 22,047 (Army Corps of Engineers procurement); Severn Cos., Inc., GSBCA No. 9425-C(9344-P), 89-3 BCA ¶ 21,915 (Army procurement); Systemhouse Fed. Sys., Inc., GSBCA No. 9446-C (9313-P), 89-2 BCA ¶ 21,773 (Army procurement) (in each of these cases GSBCA awarded attorneys' fees without requiring reimbursement of judgment fund).

reimbursement order from those that are inappropriate. Nevertheless, the board has clarified the policy concerns that led to its reimbursement order in the *Julie Laboratories* case, providing its most stinging indictment of agency protest practices in its *Bedford Computer Corp.* (*Bedford*) decision.[30]

In *Bedford*, pursuant to a settlement agreement with the Army, the protester had sought GSBCA approval of $75,000 in attorneys' fees and other costs. The Army agreed that the protester was due the claimed amount, but the board was unwilling to pay the fees claimed based on the agreement of the parties alone. Instead, the board noted that *its* discretion determined whether the award of fees would obtain, and it refused to grant an award for attorneys' fees merely because the parties agreed in a settlement that they were due.[31] The board explained that the record before it was inadequate to demonstrate whether a statutory or regulatory violation had occurred during the procurement process, the correction of which would further full and open competition, and thus justify such an award.[32] The GSBCA left the record open for further supplementation by the parties to justify a fee award before ruling finally on the motion for reimbursement of attorneys' fees and other costs.[33]

Although the holding at that stage in the litigation of the parties' motion to approve the settlement was not controversial, dicta in the *Bedford* opinion and the opinion of the dissent were extremely critical of agency bid protest practice before the GSBCA. The board lambasted the practice by noting that,

> one will search in vain for any indication in the legislative history of the Brooks Act to support the notion that Congress intended to imbue the very agencies whose procurements are protested with the discretion to implement Brooks Act provisions permitting reimbursement of [protesters' costs] from the judgment fund as an alternative to correcting the improprieties which occur in the conduct of their procurements. That is a decision which the Act entrusts to the Board.[34]

The board's concern was that the ability of an agency to settle a case with monies from the judgment fund enables it to settle protests painlessly rather than to change poor procurement practices.

The GSBCA further criticized the Army by pointing out that it could have paid attorneys' fees and other settlement costs directly from its own appropriations rather than seeking board approval for payment from the judgment fund.[35] This criticism marked just the opening salvo. The board continued its rebuke of agency practices by explaining that it had considered the possibility that an agency might "buy off" a protester by agreeing to a completely meritless settlement, because it would be painless to the agency due to its payment from the judgment fund.[36] The board noted the ethical dilemma faced by agency attorneys practicing before it who ostensibly represent the interests of the United States, but whose "clients" are the agencies that employ them.[37] The dilemma becomes acute, in the board's view, when the parties seek to settle their differences from the judgment fund, the interests of which are not represented directly in the proceeding.

Judge Hendley, in his dissenting opinion in *Bedford*, criticized the majority for refusing to allow the parties to settle the case on the record before the board[38] and continued the diatribe against agency protest settlement practices. Judge Hendley explained that,

> the only reason we have this case before us is that the agencies have discovered a pipeline to the mint, i.e., the settlement amount, $75,000 is ultimately to be paid from the permanent indefinite judgment fund and the respondent need not reimburse that fund from its appropriations.... I share wholeheartedly the majority's distrust of painless settlements which are to be paid ... without the respondent reimbursing that fund from its own appropriation.... In my view, the solution to that troublesome issue is to require the respondent to reimburse the permanent indefinite judgment fund in the amount of the payment.[39]

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[30] GSBCA No. 9837-C (9742-P), 89-2 ¶ 21,827, at 109,809, *modified*, GSBCA No. 9837-C (9742-P), 90-1 BCA ¶ 22,377.

[31] *Id.* at 109,810-14.

[32] *Id.* at 109,812.

[33] *Id.* at 109,814-15.

[34] *Id.* at 109,811.

[35] *Id.* at 109,812.

[36] *Id.* at 109,813.

[37] *Id.* at 109,813 & n.3.

[38] *See id.* at 109,815 (Hendley, A.L.J., dissenting). Judge Hendley complained: "The majority has managed to create the ultimate legal monstrosity—the case the parties cannot settle. The majority has managed to do so, not as the result of the urging or argument of any party to the case, but by themselves alone." *Id.*

[39] *Id.*

Judge Hendley continued:

> That the law favors settlements is well- settled.... Here, however, the protester and the respondent have agreed to settle the protest by having a third entity, the permanent indefinite judgment fund, pay the cost of the settlement. Thus, A and B have settled by agreeing that C will pay the cost of the settlement. This happy solution does not exist elsewhere in our legal experience, since A and B ordinarily cannot bind C to such an agreement.... [In this case,] any monetary sacrifice involved in the settlement is not borne by the agency itself, thus undermining confidence in the equity of such a settlement.[40]

Judge Hendley would have awarded the attorneys' fees sought, but he also would have ordered reimbursement of the judgment fund on the authority of the *Julie Laboratories* decision.[41] Ultimately, his view was to carry the day; after the parties presented further evidence indicating that the government actually had committed statutory and regulatory violations, the board awarded the attorneys' fees and costs agreed to in the settlement, and ordered reimbursement of the judgment fund for the amount awarded.[42]

Since *Bedford*, the GSBCA regularly has awarded costs and attorneys' fees from the judgment fund, but it has been inconsistent in ordering agency reimbursement of the fund.[43] When ordering reimbursement, the board has refrained from adding to the ringing criticism of agency practice that still echoes from *Bedford*, apparently content on resting its orders upon the strength of the *Julie Laboratories* decision rather than feeling the need to expound further on the underlying policies.[44] Consequently, the strength of the board's reimbursement orders depends on the soundness of its interpretation of the applicable statutes in *Julie Laboratories*, with perhaps some consideration due as well to the policy concerns expressed in *Bedford*.

Statutory Interpretation

In its *Julie Laboratories* decision the GSBCA divined its authority to order reimbursement of the judgment fund from three statutory provisions:[45] 1) the CDA, which requires reimbursement of the judgment fund for awards made in contract disputes;[46] 2) the GSBCA's statutory mandate to "accord due weight to the policies of [the Brooks Act] and the goals of economic and efficient procurement";[47] and 3) the board's broad statutory authority to order any additional relief permissible under statute or regulation.[48]

Whether Congress intended these cited grounds to permit the GSBCA to order reimbursement of the judgment fund is a question of statutory interpretation that must begin with the statutory language itself, and, if necessary, must include examination of the legislative history.[49] Although the CDA is inapplicable in bid protest cases,[50] the GSBCA nevertheless relied heavily on the CDA's legislative history to support its reimbursement order, declaring the order in *Julie Laboratories* to be consistent with the purposes underlying the reimbursement provision of the CDA.[51] The board thus failed to heed a basic

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[40] *Id.* at 109,815-16.

[41] *Id.* at 109,817.

[42] *See* 90-1 BCA ¶ 22,377. A concurring opinion by Judge Hendley noted an additional, albeit statutorily superseded, authority for ordering reimbursement of the judgment fund. Fed. Acquisition Reg. 33.105(f)(2) (25 Nov. 1988) [hereinafter FAR] states that awarded costs and attorneys' fees in GSBCA bid protests "shall be paid promptly by the agency out of funds available to or for the use of the acquisition of supplies or services." Why the FAR provision should differ from the statutory provision of the CICA is unclear, but GSBCA practice uniformly has been to follow the statute and to award costs and attorneys' fees from the judgment fund.

[43] *See* sources cited *supra* note 29.

[44] In one of its latest cases to order reimbursement, the majority opinion did use a "*see also*" cite that acknowledged the FAR preference for payments from agency appropriations. *See* Berkshire Computer Prods., GSBCA No. 10452-C (10338-P) (9 Feb. 1990) (citing 48 C.F.R. § 33.105(f)(2) (1988)); sources cited *supra* note 42.

[45] 89-1 BCA ¶ 21,213, at 107,021.

[46] *See supra* notes 15, 16 and accompanying text.

[47] 40 U.S.C. § 759(f)(5)(A) (Supp. V 1987).

[48] *Id.* § 759(f)(6)(C) (Supp. V 1987).

[49] United States v. John C. Grimberg Co., Inc., 702 F.2d 1362, 1365 (Fed. Cir. 1983) ("[a]nalysis must begin with the language of the statute").

[50] *See supra* note 17 and accompanying text.

[51] 89-1 BCA ¶ 21,213, at 107,021 (citing S. Rep. No. 1118, 95th Cong., 2d Sess. 33 (1978)). The cited report gave the following explanation for requiring an agency to repay an award from the judgment fund from its own appropriation:

> There may be an incentive in certain cases on the part of the procuring agency to avoid settlements and prolong litigation in order to have the final judgment against the agency occur in court, thus avoiding payment out of agency funds. Second, the practice may tend to hide from Congress the true economic costs of some procurements by not requiring the agencies to seek additional appropriations to pay the judgment.
>
> In order to promote settlements and to assure that the total economic cost of procurement is charged to those programs, all judgments awarded on contract claims are to be paid from the defendant agency's appropriations. If the agency does not have the funds to make the payment the agency is to request additional appropriations from Congress.
>
> One of [Congress's] primary objectives was to induce more resolution of disputes by negotiation and settlement. Requiring the agencies to shoulder the responsibility for interest and payment of judgments brings to bear on them the only real incentives available to induce more management involvement in contract administration and dispute resolution.

S. Rep. No. 1118, 95th Cong., 2d Sess. 23-33, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5267.

rule of statutory construction by examining a legislative history without a thorough analysis of the relevant statutory provisions themselves. Moreover, the legislative history it examined was of a statute totally irrelevant to the case before the board. The policies that justify reimbursement of the judgment fund under the CDA, which concern insuring that agencies bear fiscal responsibility for the procurement decisions they make, certainly coincide with the policies the GSBCA sought to further with its order in *Julie Laboratories*. Furtherance of policy concerns, however, does not substitute for adherence to the law. Thus, the legislative history of the CDA was a poor starting point for properly interpreting the applicable statutes, and the board's reliance on it weakens the credibility of the opinion.[52]

The GSBCA's statutory authority in bid protest cases, including its authority to award attorneys' fees, derives exclusively from the CICA, which amended the Brooks Act to expand the board's jurisdiction to cover protests as well as disputes related to the acquisition of computers and computer-related services.[53] The meaning of the applicable statutory provision is clear from its language: section 759(f)(5)(C) of title 40 requires payment of attorneys' fees from the judgment fund.[54] No statutory authority requires a procuring agency to reimburse the judgment fund after an award of attorneys' fees or other costs in GSBCA protest cases.[55] Unfortunately, the legislative history does not explain why Congress did not adopt a reimbursement requirement in the CICA as it had done in other legislation.[56]

Authorities arguably could interpret the omission of a reimbursement requirement as having been a mere oversight by Congress,[57] but that construction does not withstand rigorous scrutiny. The law and the courts must presume Congress to act with deliberation, rather than by inadvertence, when it drafts a statute.[58] Moreover, in the same legislation in which it directed that attorneys' fees would come from the judgment fund in GSBCA protest cases—the CICA—Congress also enacted a provision that requires agencies to pay fees from agency appropriations in GAO protests.[59] "When Congress uses explicit language in one part of a statute to cover a particular situation and then uses different language in another part of the same statute, a strong inference arises that the two provisions do not mean the same thing."[60] Accordingly, the congressional drafters clearly knew how to require reimbursement if they so desired. Congress previously had included language requiring reimbursement in the CDA, and it achieved the same result by requiring payment of costs and attorneys' fees from agency funds for GAO protests and judicial and administrative agency cases falling under the Equal Access to Justice Act.[61] Congress simply did not require reimbursement of the judgment fund under the CICA for GSBCA bid protests.

In the face of this clear statutory language, the GSBCA's broad mandate to further the policies of economic and efficient procurement, and its authority to grant any additional relief authorized by law,[62] do not support the board's action in ordering reimbursement of the judgment fund. Regardless of the merit of the policies

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[52] In the appeal by the government of the *Julie Laboratories* decision to the Federal Circuit, the appellee relied on the CICA's legislative history, which referred to the CDA, in an attempt to bootstrap the CDA's reimbursement requirement to GSBCA bid protest practice. Its brief explained:

> Both congressional committees which considered what became the protest provisions of the Brooks Act expected that the GSBCA would resolve protests using its procedures already established under the Contract Disputes Act:
>
> > The conference substitute provides that remedy by authorizing the GSA Board of Contract Appeals to consider protest cases involving ADP procurements conducted under P.L. 89-306 [the Brooks Act]. The Board is well suited to hear protests of this nature. First, the Board can use already established procedures to hold hearings, compel production of documents, obtain testimony of witnesses, and conduct cross-examination under oath. Second, the Board can use the authority which GSA currently has under the Brooks Act to revoke, suspend or modify a delegation of procurement authority. Further, the Board is authorized to suspend any contract which was awarded ....

Brief for Appellee at 8-9, United States v. Julie Research Laboratories, Inc., 881 F.2d 1067 (Fed. Cir. 1989) (No. 89-1232) (quoting H.R. Rep. No. 861, 98th Cong., 2d Sess. 1430-31, *reprinted in* 1984 U.S. Code Cong. & Admin. News 2118-19) (emphasis added).

Use of the same *procedures* as under the CDA, of course, does not permit the GSBCA to adopt the substantive requirements of the CDA, as the appellee must have hoped the Federal Circuit would infer. The appellee's brief actually goes on to claim explicitly that the reimbursement provision of the CDA is merely a procedural requirement. Brief for Appellee at 16. The Federal Circuit, however, did not decide the issue and dismissed the case on other grounds. *See supra* note 11.

[53] *See* sources cited *supra* note 9.

[54] *See supra* notes 3, 4 and accompanying text.

[55] 89-1 BCA ¶ 21,213, at 107,021 (Borwick, A.L.J., concurring in part and dissenting in part); *see* Letter, *supra* note 11, at 2.

[56] Brief for Appellant at 12, United States v. Julie Research Laboratories, Inc., 881 F.2d 1067 (Fed. Cir. 1989) (No. 89-1232).

[57] *See* Brief for Appellee at 16, *Julie Research Laboratories* (No. 89-1232).

[58] United States v. Motamedi, 767 F.2d 1403, 1406 (9th Cir. 1985).

[59] Brief for Appellant at 12, *Julie Research Laboratories* (No. 89-1232); *see supra* notes 21, 22 and accompanying text.

[60] Persinger v. Islamic Republic of Iran, 729 F.2d 835, 843 (D.C. Cir.), *cert. denied*, 469 U.S. 881 (1984); *see* Russello v. United States, 464 U.S. 16, 23 (1983).

[61] *See* 5 U.S.C. § 504(d) (1988); 28 U.S.C. § 2412(d)(4) (Supp. V 1987). The Equal Access to Justice Act does not apply to GSBCA bid protests, although it does apply in contract dispute cases before the board. *See* The Thorson Co., GSBCA No. 8820-C(8185-P), 87-1 BCA ¶ 19,633.

[62] *See supra* notes 47, 48 and accompanying text.

furthered by the board's reimbursement order, CICA limits the GSBCA to providing "relief which it is authorized to provide under any statute or regulation."[63] As Judge Borwick stated in his dissent to the *Julie Laboratories* decision, "if Congress had wished to adopt [the policy of reimbursement], it would have specifically done so, as it did in the CDA. As Congress has not, [the board should] not revise the [CICA] to require such reimbursement."[64]

Even if no statutory construction directly supported the board's reimbursement order, however, the board's authority to amend delegations of procurement authority from the Administrator of the General Services Administration (Administrator) to other federal agencies arguably could have allowed the board to impose a reimbursement requirement.[65] The Administrator's discretion to delegate procurement authority is very broad. Arguably, that authority permits the Administrator to condition an agency's exercise of delegated authority on numerous contingencies or to impose requirements with no specific statutory basis other than the Administrator's general grant of authority under the Brooks Act.[66] Accordingly, the GSBCA's discretion in amending a delegation of procurement authority should be just as broad as the Administrator's, because its power to direct amendments is as broad as the Administrator's power to dictate the terms of the delegation in the first place.[67]

This analysis, which compares the breadth of the GSBCA's authority to the authority of the Administrator, still has its limits as a basis for supporting the board's reimbursement order. Although the board may be able to impose requirements on agencies not otherwise mandated by statute, it cannot direct actions that statutes otherwise prohibit under the guise of exercising its lawful discretion. On its face, the *Julie Laboratories* decision does not appear to contravene any statute directly because the board actually orders the government to make the payment of the awarded fees from the judgment fund. The additional order, however, that requires the agency to reimburse the judgment fund, may be an abuse of discretion if this use of agency funds would be contrary to other statutory requirements. The board's analysis in *Julie Laboratories* stopped short of fully examining this possibility.

The Fiscal Law Issue

The most glaring deficiency in the board's reasoning in its *Julie Laboratories* decision is its complete omission of any reference to the power of the purse, which lies exclusively within the hands of Congress. That "no Money can be paid out of the Treasury unless it has been appropriated by an act of Congress" is well established.[68] To ensure that the government spends appropriated monies as Congress intended, Congress has passed extensive legislation to control agency expenditures, including provisions pertinent to the controversy surrounding the board's order in *Julie Laboratories*.[69]

Congress has mandated that agencies shall use monies appropriated only for the objects of the appropriations, unless it provides otherwise by law.[70] The Comptroller General, as the head of the General Accounting Office (GAO), which keeps tabs on congressional appropriations, has established the following test to determine whether an agency has made expenditures for the proper objects or purposes of congressional appropriations: 1) the agency must make the expenditures for the particular object of an appropriation, or they must be necessary and incidental to the proper execution of the object; 2) the law must not prohibit the expenditures; and 3) another appropriation must not provide for the expenditures, that is, the expenditures must not fall within the scope of some other appropriation.[71] The GSBCA, however, neglected to consider the impact of this test on the legality of its order in *Julie Laboratories* to reimburse the judgment fund.

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[63] 40 U.S.C. § 759(f)(6)(C) (Supp. V 1987).

[64] 89-1 BCA ¶ 21,213, at 107,021.

[65] 40 U.S.C. § 759(f)(5)(B) (Supp. V 1987):

> If the board determines that a challenged agency action violates a statute or regulation or the conditions of any delegation of procurement authority issued pursuant to this section, the board may suspend, revoke, or revise the procurement authority of the Administrator or the Administrator's delegation of procurement authority applicable to the challenged procurement.

[66] *See* 41 C.F.R. § 201-23.100 (citing 40 U.S.C. § 759 as authority for delegating Administrator's procurement authority to other agencies). The remainder of subpart 201-23.1, sets forth detailed provisions governing the delegation of procurement authority and imposes numerous requirements on other federal agencies that statutes do not mandate. Subpart 201-23.1 is a subsection of the Federal Information Resources Management Regulation, 41 C.F.R. ch. 201 (1989).

[67] 40 U.S.C. § 759(f)(5)(B) (Supp. V 1987). Actually, this provision authorizes the GSBCA to amend or to revoke even the Administrator's own procurement authority.

[68] Cincinnati Soap Co. v. United States, 301 U.S. 308, 321 (1937) (interpreting U.S. Const. art. I, § 9, cl. 7, which states that "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law").

[69] *See, e.g.*, 31 U.S.C. § 1301(a) (1982) ("purpose statute" requiring that "[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law").

[70] *Id.*

[71] *See* 63 Comp. Gen. 422 (1984); 34 Comp. Gen. 195 (1955). The Comptroller General is Congress's agent for the purpose of determining the legality of administrative expenditures. Green County Planning Bd. v. Federal Power Comm'n, 559 F.2d 1227, 1234 (2d Cir. 1976); *see* 31 U.S.C. §§ 711-20 (1982 & Supp. V 1987).

The government may use funds appropriated for agency procurements to settle bid protests and to pay for attorneys' fees and other costs as part of those settlements because 1) these expenditures are necessary and incidental to agency acquisitions, 2) the law does not prohibit them, and 3) other appropriations do not otherwise provide for them. However, when the GSBCA makes an award of attorneys' fees or costs to a protester and orders the agency to pay the award from its own appropriations, the board's action does not satisfy the final prong of the test because these payments are statutorily within the scope of another appropriation—the permanent indefinite judgment fund.[72]

Ordering reimbursement of the judgment fund for awarded costs and attorneys' fees is tantamount to ordering the payment of these awards directly from agency appropriations. Because Congress has provided otherwise, such an agency expenditure is not permissible. Executive agency officials can face harsh penalties for spending funds contrary to the statutory mandates of Congress.[73] "Thus, a disbursing official of the Department of the Army act[ed] at his peril if he order[ed] the reimbursement of the judgment fund in accordance with the board's ruling in [*Julie Laboratories*]."[74]

Despite its meritorious intentions in seeking to further efficient and economic procurement through its reimbursement order, the GSBCA cannot override statutory requirements. Without a firm statutory basis on which to do so, "[a tribunal] simply lacks the power to order the obligation of public funds, regardless of how appropriate a remedy that order would be."[75] The board's reimbursement order thus exceeded the scope of its permissible discretion, because only "Congress has the authority to determine how judgments against the government will be paid."[76]

Policy Concerns

Notwithstanding the GSBCA's lack of solid legal foundation upon which to base its reimbursement order in *Julie Laboratories*, the decision makes good sense from a policy perspective. As the board pointed out in *Bedford*, settlements between two parties that tap into funds from a third source to resolve their differences undermine public confidence in the equity of such settlements.[77] If the government is to meet the goal of efficient and economic procurement,[78] federal agencies should bear full fiscal responsibility for the procurement decisions they make.

With public concern about fraud and waste in the government procurement system near an all time high, and with Congress ever in search of ways to trim the federal budget, executive agencies cannot afford to appear less than fully responsible in every spending decision they make. While the GSBCA attempted to circumvent an apparently irresponsible practice in the *Julie Laboratories* case, the board simply ran afoul of the strictures that Congress has placed on the federal spending process by acting beyond its allowable discretion. Most important, in doing so, the board has highlighted the need for legislation to correct what the board perceives to be a loophole that allows agencies to tap the judgment fund without reimbursement. If Congress acts to bring the payment of attorneys' fees and other costs in GSBCA bid protests in line with the practice in other forums,[79] federal agencies should not oppose such legislation.

Conclusion

In its effort to cut what it viewed as a "pipe-line to the mint"[80] that federal agencies were abusing, the GSBCA kindled a significant controversy within the executive

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[72] *See* sources cited *supra* notes 3, 4.

[73] *See, e.g.*, 31 U.S.C. §§ 1349-50 (1982) (adverse personnel actions and criminal penalties possible for violations of congressional spending limitations).

[74] Brief for Appellant at 16, *Julie Research Laboratories* (No. 89-1232).

[75] National Ass'n of Regional Councils v. Costle, 564 F.2d 583, 590 (D.C. Cir. 1977).

[76] Brief for Appellant at 15, *Julie Research Laboratories* (No. 89-1232). To counter the constitutional arguments concerning the spending power of Congress made by the appellant in its brief appealing the GSBCA's order to the Federal Circuit, the appellee's brief attempted to characterize the board's reimbursement order as a reprogramming within the general purpose of the agency appropriation from which the funds would have come. That brief, however, confuses the concepts of reprogramming from one object to another within an appropriation with the concept of transfer between appropriations. Admitting that a transfer would require statutory authority, the brief mistakenly concludes that the reimbursement of the judgment fund would be a reprogramming of funds within the Army's procurement appropriation. *See* Brief for Appellee at 18, *Julie Research Laboratories* (No. 89-1232). For the appellee's argument to have merit, the judgment fund would have to be a part of the Army's procurement appropriation, which it clearly is not.

[77] *See supra* note 39 and accompanying text.

[78] *See supra* note 47 and accompanying text. In theory, charging attorneys' fees and other protest costs to agency appropriations should make agencies more careful to avoid these costs. To avoid expensive protests, agencies likely would try to follow applicable statutes and regulations closely, thereby improving the efficiency of their procurements.

[79] *See supra* notes 15-25 and accompanying text.

[80] *See supra* note 39 and accompanying text.

department. In attempting to fulfill its responsibilities under the Brooks Act to further efficient federal procurement of computers and computer-related services, by ordering federal agencies to reimburse the judgment fund for awards of attorneys' fees and costs in bid protest cases, the board infringed directly on Congress's exclusive power over the federal purse. Although it was Congress's authority that the GSBCA infringed, it was the agency disbursing official who had to make the difficult choice of whether to follow the board's orders or to follow applicable fiscal laws.[81] Until the Justice Department resolved the *Julie Laboratories* controversy between the Army and the GSBCA,[82] the dilemma faced by dispersing officials confronted with reimbursement orders continued with uncertainty. Fortunately, the Justice Department resolved this dispute in the executive department in favor of the Army. Predictably, the Deputy Assistant Attorney General opined that the GSBCA's reimbursement order was improper because, even though the GSBCA may have declared that sound policy reasons supported its order, existing statutes precluded the board's attempt to divert funds from one appropriation to another. Ultimately, Congress should act to bring the payment of attorneys' fees and protest costs in GSBCA protest cases in line with practices elsewhere by heeding the policy concerns raised by the board and by making attorneys' fees and other protest costs the direct responsibility of procuring agencies.

[81] *See supra* notes 68-74 and accompanying text.

[82] *See* sources cited *supra* note 11.

USALSA Report

United States Army Legal Services Agency

The Advocate for Military Defense Counsel

DAD Notes

Urinalysis: Health and Welfare Inspection or Criminal Proceeding for Obstruction of Justice Purposes?

The Army Court of Military Review recently upheld a conviction for obstruction of justice[1] based upon the submission of toilet bowl water instead of urine during a unit inspection.[2] In doing so, the Army court acknowledged that urinalysis inspections often give rise to criminal proceedings, and that the possibility of criminal proceedings alone supports an obstruction of justice conviction.

The decision in *United States v. Turner* raises many unanswered questions. Did the Army court intend to define every urinalysis inspection as a criminal proceeding? Is the mere possibility of a court-martial sufficient to manifest knowledge of a specific, actual, or pending criminal proceeding required for obstruction of justice? What effect does the court's decision have on the administrative nature of urinalysis inspections?

The accused in *Turner*, fearing that her urine specimen would test positive, submitted toilet bowl water instead

[1] *See* Manual for Courts-Martial, United States, 1984, Part IV, para. 96 [hereinafter MCM, 1984]. MCM, 1984, paragraph 96, defines the elements necessary for the offense of obstructing justice as follows:

> (1) that the accused wrongfully did a certain act; (2) that the accused did so in the case of a certain person against whom the accused had reason to believe there were or would be criminal proceedings pending; (3) that the act was done with the intent to influence, impede, or otherwise obstruct the due administration of justice; and (4) that under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

[2] United States v. Turner, 30 M.J. 984 (A.C.M.R. 1990).

of her urine. This submission formed the basis for the obstruction of justice charge. That the obstruction of justice charge arose out of a random urinalysis did not deter the Army court. The court stated that "Mil. R. Evid. 313(a) contemplates that in some cases, criminal proceedings will arise out of the conduct of random unit inspections. Correspondingly, the officials directing and conducting such inspections contemplate the possibilities of criminal proceedings ... to adjudicate some of the offenses discovered in the course of such inspections."[3]

In *Turner* the Army court applied the same definition for obstruction of justice as it previously had applied in *United States v. Gray.*[4] In *Gray* the court observed that to support a specification of obstruction of justice "there must be some allegation that an official authority has manifested an official act, inquiry, investigation, or other criminal proceeding with a view to possible disposition within the administration of justice of the armed forces."[5] The *Gray* court overturned a conviction for obstruction of justice. The accused in *Gray* was a noncommissioned officer engaged in sexual misconduct with trainees. The obstruction of justice charge arose from the accused's advice to his paramour that she was not to discuss their sexual relationship with anyone or they would both get into trouble.[6] The Army court held that, at the time of the admonition, no one had brought an allegation of misconduct concerning illegal sexual activities to the attention of an official authority. Therefore, the government was not able to establish the elements of the offense.[7] The *Gray* court concluded by noting that the essence of the offense of obstruction of justice is the obstruction or interference with the administration of justice in the military system.

Reconciling the *Turner* decision in light of *Gray* is not easy. Both cases involved conduct that apparently occurred before the command actually considered or commenced any investigation or official inquiry into misconduct, yet the court reached opposite results.[8]

With the *Turner* decision, the Army court arguably has expanded the scope of the crime of obstruction of justice.[9] Prior case law required the accused to *know* of *manifested* official activity with a view toward possible disciplinary action, and then to take some affirmative act by which he or she endeavored to influence, impede, or otherwise obstruct that official action in some given objective manner, before a charge of obstruction of justice would lie.[10] Apparently, the Army court now, in urinalysis cases, no longer requires prior knowledge of a specific, actual, or pending criminal proceeding or formal investigation.[11] Given that the primary purpose of a true military inspection is to determine and to ensure the security, military fitness, or good order and discipline of the unit—and not to gather evidence for use in criminal prosecutions[12]—arguably a soldier normally would not know or expect that an official authority, by way of a unit urinalysis inspection, had manifested an official act pertaining directly to the administration of a disciplinary action.[13] If urinalysis inspections are truly administrative, no official inquiry exists to serve as the basis for an obstruction of justice charge. The Army court will have difficulty sustaining the rationale that a urinalysis inspection can support a conviction for obstruction of justice, and then hold it to be an administrative inspection to dispense with the probable cause and warrant requirements of the fourth amendment.[14]

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[3] *Turner*, 30 M.J. at 986.

[4] 28 M.J. 858 (A.C.M.R. 1989).

[5] *Id.* at 861.

[6] *Id.* at 860.

[7] *See id.* at 861.

[8] One explanation for the different results may be the subject matter. *Turner* involved drugs, whereas *Gray* involved sexual misconduct. Given society's war on drugs, the court may be allowing the government some leeway. Another possible reason is that in *Turner*, although not explicitly stated, the court may have viewed the urinalysis inspection as itself having significance—that is, being itself an "official investigation" or being an official action from which some sort of report necessarily would result. In *Gray*, however, the subject of the charge was a cover-up of an incident otherwise unknown and unreported. On the other hand, both *Gray* and *Turner* mention that *possible* disposition within the military justice system is critical. Thus, both opinions—but especially the *Turner* case—may turn on possibilities, rather than known actualities.

[9] The Navy-Marine Corps Court of Military Review also upheld a conviction of obstruction of justice for submitting "clean" urine in place of one's own urine. The court supported its reasoning by indicating that nothing in the applicable directives remotely suggests the preclusion of disciplinary action as a result of such testing. *See* United States v. McDade, CM 860966 (N.M.C.M.R. 30 June 1986).

[10] *Gray*, 28 M.J. at 861.

[11] *See supra* note 8.

[12] *See* MCM, 1984, Military Rule of Evidence 313(b) [hereinafter Mil. R. Evid.].

[13] *Cf.* Army Reg. 635-200, Personnel Separations: Enlisted Personnel, para. 9-1 (1 Dec. 1988).

[14] U.S. Const. amend. IV; *see* Skinner v. Railway Labor Executives' Association, 109 S. Ct. 1402 (1989); National Treasury Employees Union v. Von Raab, 109 S. Ct. 1384 (1989) (holding that random urinalysis inspections are reasonable under the fourth amendment if special needs exist beyond the normal needs of law enforcement).

Based on the *Turner* decision, trial defense counsel have authority from which to argue that the court should view the Army's interest in conducting random urinalysis inspections as beyond the normal needs of law enforcement. This argument, in turn, may provide a basis for challenging the constitutionality of the Army's urinalysis program in general.[15] Such a challenge would support an attack in any urinalysis case, whether or not the case also involved an obstruction of justice issue. If, however, the government prosecutes an obstruction of justice charge, defense counsel can argue that the *Turner/Gray* dichotomy forms a basis to challenge the specification as a matter of law. Captain Pamela J. Dominisse.

United States v. Crumley: Knowledge Is Now an Element in Drug Distribution Cases

The Court of Military Appeals recently added a third element that the government must prove in drug distribution cases. In *United States v. Crumley*[16] the court held that knowledge on the part of the accused is an element of wrongful distribution. While the complete absence of an instruction on an element of an offense normally requires reversal, the court applied a harmless error analysis because, under the instructions given at trial, the panel could not have found the accused guilty of wrongful distribution without finding that the element of knowledge was present.[17]

In *Crumley* the government charged the accused with conspiring with his wife during March 1987 to distribute cocaine to civilian and military personnel in the Fort Hood area. The government also charged him with distributing cocaine to a soldier, who actually was an undercover Criminal Investigation Command (CID) agent, in March and April of 1987. The government's case rested on the testimony of the CID agent and the registered source who testified that the accused was involved actively in the drug transactions. The accused, however, maintained that he had been elsewhere when the distributions occurred and that his wife actually was the drug dealer. Several members of the accused's family corroborated his account.[18]

In his instructions on wrongful distribution, the military judge explained that, to be punishable, the distribution must be "wrongful" and that it "is wrongful if it is without legal justification or authorization." Also, he advised the members that, as to the specification alleging wrongful distribution on April 29, "the Government [was] using the theory of aiding and abetting"; and that "[a]n aider or abettor must knowingly and willfully participate in the commission of the crime as something that he wishes to bring about and must aid, encourage, or incite the person to commit the criminal act."[19] As to the conspiracy charge, the judge instructed that the elements of the offense were "an agreement" between Crumley and his wife to distribute cocaine and the performance by Crumley of an overt act alleged in the specification—namely, that "he maintained contact with suppliers of cocaine for the purpose of bringing about the object of the agreement ... to distribute cocaine to military and civilian personnel."[20] The military judge did not instruct the panel specifically that knowledge on the part of the accused was an element of wrongful distribution. The appellate court held that the instruction should have been given, but it determined that the trial court nevertheless gave the instruction indirectly. The court, therefore, affirmed the conviction.[21]

In *United States v. Mance*[22] and *United States v. Brown*,[23] the Court of Military Appeals held that in cases of possession or use of a controlled substance the government must prove that the accused knew of both the presence and the character of the controlled substance.[24] The court affirmed the conviction in *Mance* because the military judge had caused the members to know, either directly or indirectly, that they must find the accused had knowledge of the presence and nature of the substance to return a conviction.[25] In *Brown*, however, the court reversed the conviction because "the military judge made no mention at all of the need to find any aspect of knowledge in order to convict."[26] After *Mance* and *Brown* the rule for possession and use cases was relatively simple: if the trial judge omitted a knowledge instruction entirely the appellate court would reverse the

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[15] *Cf.* United States v. Whipple, 28 M.J. 314, 316 n.5 (C.M.A. 1989) (failing to address impact that *Skinner* and *Von Raab* may have on urinalysis testing of pilots with or without cause); cases cited *supra* note 14. *But see* United States v. Lizasuain, 30 M.J. 543 (A.C.M.R. 1990).

[16] CM 62,205 (C.M.A. 6 Sep. 1990).

[17] *Crumley*, slip op. at 8 (citing United States v. Mance, 26 M.J. 244 (C.M.A.), *cert. denied*, 109 S. Ct. 367 (1988)).

[18] *Id.* at 3-6.

[19] *Id.* at 6.

[20] *Id.*

[21] *Id.* at 9-10.

[22] 26 M.J. 244 (C.M.A. 1988).

[23] 26 M.J. 266 (C.M.A. 1988).

[24] *Mance*, 26 M.J. at 253; *Brown*, 26 M.J. at 267.

[25] *Mance*, 26 M.J. at 256.

[26] *Brown*, 26 M.J. at 267.

conviction; however, if the trial judge gave an instruction erroneously or indirectly, then the appellate court would apply a harmless error standard.

The court now has extended the *Mance* and *Brown* analyses and requirements to drug distribution cases. The court cited three reasons for its decision. First, wrongful possession is a lesser-included offense of wrongful distribution,[27] and to hold that knowledge was an element of the lesser-included offense but not of the greater offense would be anomolous. Second, in federal prosecutions for wrongful distribution under 21 U.S.C. § 841(a)(1),[28] the government must prove the defendant's knowledge and intent to distribute.[29] Finally, although the language of article 112a is less specific than its federal counterpart, the court did not believe that Congress intended that the military justice system could subject a service member to the penalties imposable for wrongful distribution unless the government proved knowledge on his part.[30]

Defense counsel now must ensure that the government meets its burden of proof on this additional element for drug distribution charges. Counsel also must ensure that the military judge gives complete and proper instructions to the court members in distribution cases. In some cases, the adequacy of the instructions alone may mean the difference between a conviction and an acquittal. Captain Robin N. Swope.

Petty Cash

A recent decision by the Army Court of Military Review addressed the issue of the convening authority's ability to convert a partial forfeiture of pay for a long duration to total forfeitures of a shorter duration. In *United States v. Petty*[31] the Army Court of Military Review departed from prior precedent and affirmed only the original partial forfeitures for the shorter duration. In *Petty* a general court-martial sentenced the accused to a dishonorable discharge, confinement for eight years, and forfeiture of $600 pay per month for ninety-six months. His pretrial agreement limited confinement to five years. In accord with the pretrial agreement, the convening authority approved the dishonorable discharge and reduced the confinement to five years. The convening authority, however, commuted the partial forfeitures for ninety-six months to total forfeitures for five years upon the advice of his staff judge advocate that this would be a reduction in the total dollar amount forfeited.

Rule for Courts-Martial (R.C.M.) 1107(d)(1)[32] authorizes convening authorities to change a component of the punishment to one of a different nature as long as the change does not increase the severity of the punishment.[33] With respect to forfeitures, the discussion of R.C.M. 1107(d)(1) provides that the convening authority may change the duration and amount of the forfeiture as long as the change does not increase the total amount forfeited and as long as the new sentence does not exceed the jurisdictional limit of the court-martial.

Although it noted that, in Petty's case, total forfeitures for five years is less money than forfeiture of $600 pay per month for ninety-six months, and although it cited cases that have affirmed commutation of sentences,[34] the Army court focused on the practical effect of the convening authority's action with respect to the accused. Accordingly, the *Petty* court found that the convening authority actually increased the total amount that the accused likely would forfeit, in violation of R.C.M. 1107(d)(1).[35]

The court took judicial notice that the appellate courts probably would complete their review, and the convening authority would execute the dishonorable discharge, before the Army collected the approved forfeitures in full. The court thereby concluded that the convening authority's action, in effect, called for total forfeitures until the Army discharged the accused, in contrast to the sentence adjudged by the military judge, which would have subjected the accused to only partial forfeitures until execution of his dishonorable discharge.[36]

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[27] *See* Uniform Code of Military Justice art. 112a, 10 U.S.C. § 912a (1988) [hereinafter UCMJ].

[28] "Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally (1) to manufacture, distribute, or dispense, or posses with intent to manufacture, distribute, or dispense, a controlled substance." 21 U.S.C. § 841(a)(1) (1988).

[29] *See* United States v. Moreno-Hinojosa, 804 F.2d 845 (5th Cir. 1986); United States v. Samad, 754 F.2d 1091 (4th Cir. 1984); United States v. Freeze, 707 F.2d 132 (5th Cir. 1983); United States v. Young, 655 F.2d 624 (5th Cir. 1981); United States v. Jones, 543 F.2d 627 (8th Cir. 1976), *cert. denied*, 429 U.S. 1051 (1977).

[30] *Crumley*, slip op. at 8.

[31] CM 8902153 (A.C.M.R. 20 July 1990).

[32] MCM, 1984, Rule for Courts-Martial 1107(d)(1) [hereinafter R.C.M.].

[33] *See also* UCMJ art. 60(c)(1), (2). *But see* Waller v. Swift, 30 M.J. 139 (C.M.A. 1990) (convening authority could not commute bad conduct discharge into confinement for 12 months).

[34] *See generally* United States v. Hodges, 22 M.J. 260 (C.M.A. 1986); United States v. Christensen, 30 C.M.R. 393 (C.M.A. 1961).

[35] *Petty*, slip op. at 3.

[36] Or until released from confinement and placed on excess leave.

The Army court appears to have drawn a distinction between cases with short periods of confinement and cases with lengthy confinement, in which the courts would complete their appellate review and the convening authority would execute the discharge prior to the accused's release from confinement.[37] The court's distinction, however, is not a valid one. Upon completion of their confinement—short or long—the Army places most soldiers facing discharge on excess leave.[38] Others simply are beyond their term of service[39] and lose their entitlements to any pay and allowances. Therefore, any increase of partial forfeitures to total forfeitures results in increased punishment because the Army either will subject the soldier to the forfeitures until discharged, or will release the soldier from confinement by placing him or her on excess on leave, whichever occurs first.[40]

Ultimately, far too many intangibles exist that may affect the duration of confinement, completion of appellate review, and the execution of a punitive discharge,[41] for a staff judge advocate to predict with any certainty that commuting partial forfeitures to total forfeitures for a shorter duration will not in reality increase the punishment. A bird in the hand (partial pay) is still worth two in the bush, and counsel should object to any attempt by the staff judge advocate to advise the convening authority to commute partial forfeitures to total forfeitures of a shorter duration. Captain James Kevin Lovejoy.

Rebuttal Evidence of Drug Use: Responding to the "I Never Used Drugs Before In My Life" Defense

In a recent Court of Military Appeals decision, *United States v. Gray*,[42] the court reiterated its position on what constitutes proper government rebuttal evidence, pursuant to R.C.M. 913(c)(1)(C),[43] following a blanket denial of drug use by an accused. The court held that the government could not introduce urinalysis test results in the rebuttal phase of an accused's drug use prosecution if those results showed that the samples tested below the minimum metabolite concentration ("cutoff") that the Department of Defense (DOD) requires to report a positive test result.[44] The court cited *United States v. Joyner*[45] as authority for this proposition.[46] *Joyner*, however, actually held that the government could use a urinalysis test result that a laboratory first reported as a "negative" if the government accompanied it with expert testimony that the original result was incorrect and that the data actually showed a "positive" test result.[47]

The *Gray* and *Joyner* cases demonstrate that the court appears to be focusing on actual data rather than on reported results. Nevertheless, both *Joyner* and *United States v. Berry*[48] reflect the court's concern that raw data needs interpretation by expert witnesses, and that the government must link results of the testing to a sample submitted by the accused.

In *Berry* the government offered in rebuttal a laboratory report prepared by the United States Army Criminal Investigation Laboratory-Pacific that appeared to indicate that the accused had submitted a urine sample that tested positive for THC.[49] The court held the report inadmissible because the government presented no expert testimony interpreting the test results, no indication of the methodology or rationale used to obtain the results, and no evidence of why and how the government obtained and transmitted the sample to the laboratory for testing.[50] Ultimately, however, the court found that while the rebuttal evidence was inadmissible, its admission constituted only harmless error.

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[37] The Army court did not cite any specific cases, but did note that previous cases approving changes from partial to total forfeitures, and vice versa, all involved relatively short periods of confinement (less than 12 months). *See Petty*, slip op. at 2.

[38] Dep't of Defense, Military Pay and Allowances Entitlements Manual, para. 10316 (1987).

[39] *Id.* at para. 10306.

[40] The only time the soldier potentially may forfeit more pay with partial forfeitures—as opposed to total forfeitures—is the rare instance when he or she leaves confinement and returns to active duty while still subject to forfeitures.

[41] Other examples of incidents that add to the uncertainty include waivers of appellate review, grants of parole or clemency, and sentence reassessments by courts of review.

[42] 30 M.J. 231 (C.M.A. 1990).

[43] R.C.M. 913(c)(1)(C).

[44] *Gray*, 30 M.J. at 232; *see also* United States v. Arguello, 29 M.J. 198 (C.M.A. 1989); Note, *Use of the Negative Urinalysis Result*, The Army Lawyer, Feb. 1990, at 64.

[45] 29 M.J. 209 (C.M.A. 1989).

[46] *Gray*, 30 M.J. at 232.

[47] *Joyner*, 29 M.J. at 212.

[48] 30 M.J. 134, 135 (C.M.A. 1990).

[49] *See Berry*, 30 M.J. at 136 (appendix) (examination of Exhibit 1 (urine sample) revealed the presence of 11-nor-Delta 9-THC acid, the major human metabolite of THC).

[50] *Id.* at 135.

The Court of Military Appeals' opinion in *United States v. Trimper*[51] also limited the conditions under which the government could introduce urinalysis test results during rebbutal. *Trimper* held that the accused must make a gratuitous denial of drug use before the government may present extrinsic evidence of drug use.[52] The government cannot extract from the accused a blanket denial in hopes of bootstrapping otherwise inadmissible evidence into the case.[53] In *Trimper* an Air Force judge advocate captain, facing prosecution on a drug use charge, denied during cross-examination that he ever was involved with drugs.[54] Unfortunately for—and unknown to—Captain Trimper, the government had a copy of test results from a urinalysis sample he submitted to a local civilian hospital some six months earlier; that sample indicated that Trimper had used cocaine.[55] The military judge admitted the results in rebuttal.

The Court of Military Appeals affirmed Trimper's conviction, citing *Walder v. United States*.[56] In *Walder* the Supreme Court held that, when a defendant testified on direct examination that he had never had any narcotics in his possession, the government was free to introduce evidence of prior possession of narcotics even though this evidence otherwise would have been inadmissible because of the government's obtaining it through an unreasonable search or seizure.

Generally, an accused cannot manipulate even the constitutionally-based exclusionary rule to permit perjury with impunity.[57] That rule apparently falls, however, when the government fails to follow its own regulations—that is, in particular, when the prosecution, in rebuttal, attempts to offer urinalysis results to evidence the accused's drug use, while official regulations would otherwise require the government to report those results as "negative."[58] The best advice for trial defense counsel in this situation is to keep direct examination of the client narrow and to encourage the client not to make gratuitously any blanket denials of drug use. Captain Jay S. Eiche.

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[51] 28 M.J. 460 (C.M.A. 1989).

[52] *Id.* at 467.

[53] *Id.*; *see* United States v. Bowling, 16 M.J. 848, 852-54 (N.M.C.M.R. 1983).

[54] *Trimper*, 28 M.J. at 462-63.

[55] *Id.* at 463-64.

[56] 347 U.S. 62 (1954).

[57] *See Trimper*, 28 M.J. at 466.

[58] Dep't of Defense Directive 1010.1, "Drug Abuse Testing Program" (Dec. 28, 1984); *Arguello*, 29 M.J. at 203.

Government Appellate Division Notes

Flag Burning: An Offense Under the Uniform Code of Military Justice?

Captain Jonathan F. Potter
Government Appellate Division

Introduction

Clayton Dugout is an unhappy basic trainee. His feet are sore. His hair is short. His girlfriend is far away and, not coincidentally, his political views have changed. Indeed, he now has decided that standing armies, especially the United States Army, are the root cause of the world's problems. Clayton has decided that he can best convey this message by burning the American flag. He does just that—dressed in civilian clothes and standing in front of the "Welcome to Fort Jackson" sign. Unfortunately, Clayton conveys his message only to the post sergeant major, who passes Clayton and spots his conflagration.

Can the military justice system hold Clayton criminally liable under the Uniform Code of Military Justice for his conduct? This article addresses that question in light of recent Supreme Court cases passing on the constitutionality of flag desecration statutes.

Texas v. Johnson and its Progeny

Gregory Lee Johnson joined other protesters in a demonstration in Dallas, Texas, held simultaneously with the Republican National Convention. The demonstrators marched through the streets of Dallas and protested the policies of the Reagan Administration. The demonstrators halted in front of Dallas City Hall, where Johnson unfurled an American flag and set it on fire. As the flag burned, the protestors chanted "America, the red, white, and blue, we spit on you." Authorities arrested Johnson and convicted him of desecrating a venerated object in

violation of Texas state law. Specifically, the Texas statute forbade the "desecration of an American flag in a way that the actor knows will seriously offend one or more persons likely to observe or discover the action."[1] On appeal, Johnson claimed that the Texas statute was not only unconstitutional as it applied to his case, but the statute was also facially unconstitutional.

In *Texas v. Johnson*[2] a sharply divided Supreme Court agreed that the statute was unconstitutional as it applied to Johnson.[3] The majority, in an opinion authored by Justice Brennan, outlined the pertinent analysis:

> We must first determine whether Johnson's burning of the flag constituted expressive conduct, permitting him to invoke the First Amendment in challenging his conviction. If his conduct was expressive, we next decide whether the State's regulation is related to the suppression of free expression. If the State's regulation is not related to expression, then the less stringent standard we announced in *United States v. O'Brien*,[4] for regulations of noncommunicative conduct controls. If it is, then we are outside of *O'Brien's* test, and we must ask whether this interest justifies Johnson's conviction under a more demanding standard.[5]

The majority found that "Johnson's burning of the flag was conduct 'sufficiently imbued with elements of communication' to implicate the First Amendment."[6]

The Court next focused on the reasons propounded by the state for its prohibition of flag desecration. The state claimed that the purpose of the prohibition was to prevent breaches of the peace and to "preserv[e] the flag as a symbol of nationhood and national unity."[7] The Court rejected the former claim, noting that no breach of the peace actually occurred. The Court concluded that the "State's position ... amounts to a claim that an audience that takes serious offense at particular expression is necessarily likely to disturb the peace."[8] The Court rejected this presumption.

The Court also rejected the State's other asserted interest—the preservation of the flag as a "symbol of nationhood and national unity." The Court first concluded that this interest was related to expression in Johnson's case.[9] Next, the Court determined that Johnson "was not ... prosecuted for the expression of just any idea; he was prosecuted for his expression of dissatisfaction with the policies of this country, expression situated at the core of our First Amendment values."[10]

Because of the Court's conclusion that the state prosecuted Johnson for the message he conveyed, the Court subjected the state's "asserted interest in preserving the special symbolic character of the flag to 'the most exacting scrutiny.'"[11]

The Court concluded that the State's interest in protecting the flag could not overcome "a bedrock principle

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[1] Tex. Penal Code §§ 42.09(a)(3), 42.09(b) (1989).

[2] 109 S. Ct. 2533 (1989).

[3] The Court refused to address the facial challenge to the statute. The Court noted that the statute also might apply to nonexpressive conduct. The statute stated that a person may violate it if he knows that his treatment of the flag "will seriously offend one or more persons likely to observe or discover his action." Tex. Penal Code Ann. § 42.09(b) (1989). He need not desire to express an idea by his conduct. The Court refused to address the facial validity of the statute "[b]ecause the prosecution of a person who had not engaged in expressive conduct would pose a different case... " 109 S. Ct. at 2538-39 n.3. The Court limited its analysis to Johnson's political "expression." *See id.*

[4] 391 U.S. 367, 377 (1968).

[5] *Johnson*, 109 S. Ct. at 2538 (citations omitted). In *O'Brien* four protestors burned their Selective Service registration certificates on the steps of a courthouse. Members of the crowd watching this activity attacked the protestors. Fortunately for the protestors, Federal Bureau of Investigation (FBI) agents witnessed the protest and rescued the protestors. After the agents advised him of his rights, O'Brien admitted that, although he knew that burning the registration certificate was a crime, he did it because of his "beliefs." 391 U.S. at 369. He argued that the statute outlawing the burning of registration certificates was unconstitutional because his burning of the certificate was "symbolic speech" protected by the first amendment. The Supreme Court disagreed:

> we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. at 377. The Court found that the statute forbidding O'Brien's conduct met these requirements. *Id.*

[6] *Johnson*, 109 S. Ct. at 2540.

[7] *Id.* at 2541-42.

[8] *Id.* at 2541.

[9] *Id.* at 2542.

[10] *Id.* at 2542-43.

[11] *Id.* at 2543.

underlying the First Amendment," namely "that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[12] The Court rejected the notion "that a State may foster its own view of the flag by prohibiting expressive conduct relating to it," noting that that it had "never before ... held that the Government may ensure that a symbol be used to express only one view of that symbol or its referents."[13] Finally, the Court refused to accord special protection to the flag. "There is ... no indication—either in the text of the Constitution or in our cases interpreting it—that a separate jurisdictional category exists for the American flag alone."[14]

Chief Justice Rehnquist, in a dissent joined by Justices White and O'Connor, stated that, "[f]or more than 200 years, the American flag has occupied a unique position as the symbol of our Nation, a uniqueness that justifies a governmental prohibition against flag burning in the way respondent Johnson did here."[15] According to the Chief Justice, "[t]he flag is not simply another 'idea' or 'point of view' competing for recognition in the marketplace of ideas."[16] Justice Stevens also authored a dissenting opinion in which he concluded that, given the "unique value" of the flag as a national symbol, the government's interest in preserving that symbol "supports a prohibition on the desecration of the American flag."[17]

In response to *Johnson*, Congress passed legislation aimed at constitutionally outlawing flag desecration. The Flag Protection Act of 1989 responded to *Johnson* by amending federal law aimed at protecting the flag in all circumstances, regardless of the content of the expression. The Supreme Court reviewed this content-neutral statute in the case of *United States v. Eichman*.[18]

In *Eichman* authorities arrested a number of protestors for burning flags in protest to the Flag Protection Act of 1989.[19] The protestors claimed that the act violated the first amendment. The Supreme Court agreed. First, the Court observed that the government had conceded that the protestors' activity was expressive conduct. Thus, the only question before the Court was whether the act was "sufficiently distinct from the Texas statute that it may constitutionally be applied to proscribe appellees' expressive conduct."[20]

The government argued that the Flag Protection Act of 1989 was constitutional because it was content-neutral. The government urged that Congress aimed the act only at protecting the physical integrity of the flag. The Court, however, disagreed, stating that, "[a]lthough the Flag Protection Act contains no explicit content-based limitation on the scope of prohibited conduct, it is nevertheless clear that the Government's asserted *interest* is "'related" to the suppression of free expression' and concerned with the content of such expression."[21] The Court noted that the conduct the act criminalizes focuses on "disrespectful treatment of the flag and suggests a focus on those acts likely to damage the flag's symbolic value."[22] The Court concluded that "[a]lthough Congress cast the Flag Protection Act in somewhat broader

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[12] *Id.* at 2544.

[13] *Id.* at 2545-46.

[14] *Id.* at 2546. In a concurring opinion, Justice Kennedy explained the "personal toll" the case exacted on him:

> The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result. And so great is our commitment to the process that, except in the rare case, we do not pause to express distaste for the result, perhaps for fear of undermining a valued principle that dictates a decision. This is one of these rare cases. 109 S. Ct. at 2548 (Kennedy, J., concurring). Although he found Johnson's conduct offensive, Justice Kennedy agreed that Johnson's acts were "speech" requiring first amendment protection. *Id.*

[15] *Id.* at 2548.

[16] *Id.* at 2552.

[17] *Id.* at 2556-57.

[18] 110 S. Ct. 2404 (1990).

[19] 18 U.S.C.A. § 700 (Supp. 1990). The Flag Protection Act of 1989 provides in pertinent part:

> (a)(1) Whoever knowingly mutilates, defaces, burns, maintains on the floor or ground, or tramples upon any flag of the United States shall be fined under this title or imprisoned for not more than one year, or both.
>
> (2) This subsection does not prohibit any conduct consisting of the disposal of a flag when it has become worn or soiled.
>
> (b) As used in this section, the term "flag of the United States" means any flag of the United States, or any part thereof, made of any substance, of any size, in a form that is commonly displayed.

Id.

[20] Authorities arrested three of the protestors in *Eichman* for a flag burning incident in Washington, D.C. These protestors were intelligent enough to burn their own flags. Four other protestors, however, made the error of stealing a flag from the flagpole of a post office. The court convicted them not only of violating the Flag Protection Act, but also for willfully injuring property of the United States. The appellate courts affirmed the latter convictions. *See Eichman*, 110 S. Ct. at 2408.

[21] *Id.*

[22] *Id.* at 2408.

terms than the Texas statute at issue in *Johnson*, the Act still suffers from the same fundamental flaw: it suppresses expression out of concern for its likely communicative impact."[23] Because the act punished the protestors for the message they conveyed, the Supreme Court strictly scrutinized the Flag Protection Act of 1989 and declared that the statute failed to pass constitutional muster.[24]

First Amendment Rights in the Military

What applicability does the Supreme Court's holding in *Texas v. Johnson* have in the military? This precise issue was recently before the Army Court of Military Review in *United States v. Hadlick*.[25] Hadlick, after committing several other crimes while on a drunken spree, spit on a United States flag that was drying inside a police station. An officer accompanying Hadlick noticed "a big glob of mucus on the flag." A court-martial convicted Hadlick of, among other crimes, desecration of the flag—conduct that was prejudicial to good order and discipline in the armed forces or of a nature to bring discredit upon the armed forces in violation of article 134.

Instead of addressing the first amendment issue, however, the Army court avoided it, finding that Hadlick spit on the flag for "no particular reason."[26] The Army court determined that Hadlick was not exercising his right to free speech and *Texas v. Johnson* did not apply. Nevertheless, the Army court determined that Hadlick's providence inquiry was inadequate to convict him of an article 134 offense because the inquiry failed to indicate that Hadlick's conduct was "observed by anyone in the armed forces, was in fact a deliberate act of desecration or was likely to be considered by anyone to be a deliberate act of desecration or service discrediting."[27]

The question still left unanswered by *Hadlick* is whether expressive conduct such as flag burning or other forms of flag desecration are punishable offenses under the Uniform Code of Military Justice. The Supreme Court long has recognized that a citizen's first amendment freedoms of speech and expression may be limited in the military. In *Parker v. Levy*[28] the Supreme Court defined first amendment rights in the military setting as follows:

> While the members of the military are not excluded from the protection granted by the first amendment, the different character of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.[29]

Levy, a physician and a captain in the Army, made several public statements to enlisted soldiers about the United States' involvement in Vietnam, claiming that he

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[23] *Id.* at 2409.

[24] *Id.* In *Eichman* the Supreme Court again divided sharply with a five-justice majority. What effect, if any, the retirement of Justice William J. Brennan, Jr., will have on the issue is an open question.

In a recent case, the Eighth Circuit reached an apparently different conclusion from the Supreme Court's decision in *Eichman*, but under slightly different facts. In *United States v. Cary*, 897 F.2d 917 (8th Cir. 1990), Cary took part in a protest of the government's decision to send United States troops to Honduras. The protest, which took place in Minneapolis, started out peacefully. When the protestors marched to an armed services recruitment center, the demonstration turned violent. Somebody broke the front windows of the recruitment center; another person shot roman candles into the building. Cary himself admitted that the situation was "dangerous". Somebody handed Cary a flag and told him to light it. Cary did so and, with others, held the flag while it burned. Cary then threw the flag into the recruitment center. Fortunately, several others realized that the building might burn and put out the blaze. Five other flag burnings took place that day, but authorities made no arrests in connection with them. Even though authorities arrested Cary and questioned him on a charge of arson, they later dropped the charges. The authorities, however, arrested and convicted him for "knowingly casting contempt upon the flag of the United States by publicly burning it in violation of 18 U.S.C. § 700." *Cary*, 897 F.2d at 921.

At trial and on appeal, Cary claimed that the statute was unconstitutional as it applied to him. Although the court found that Cary's action was expressive conduct, it found that the governmental interest in preventing breaches of the peace justified Cary's conviction. The Eighth Circuit noted that,

> unlike *Texas v. Johnson*, the government's interest in preventing breaches of the peace is implicated by the facts in this case. Cary inserted himself into a concededly violent situation. Windows were being broken. People were yelling. Roman candles were being shot into the Recruitment Center. As these events transpired, Cary walked into the fray. Within approximately two minutes after the violence first erupted, he and an unidentified woman burned an American flag. Because of the ongoing violence, there was an immediate threat that the burning would encourage the violence to continue.

Cary, 897 F.2d at 922. The court concluded that Cary's punishment was not related to the message he meant to convey by burning the flag. The punishment, rather, "was directly related to protecting against violence on the part of vandals who would likely be spurred on by Cary's means of expression..." *Id.* at 924. The court determined that the government has the power to punish conduct that "poses an imminent threat of continuing an ongoing breach of peace." *Id.* at 925. The Eighth Circuit also held that suppression of Cary's conduct promoted an important interest in protecting against further breaches of the peace, and it determined that the restriction was no greater than necessary to protect that interest. *Id.* at 926. The court, noting that its decision rested "squarely on the facts of this case," affirmed Cary's conviction. *Id.*

[25] CM 8900080 (A.C.M.R. 30 Nov. 1989). The case was before the Army court after the Court of Military Appeals specified the issue. 29 M.J. 280 (C.M.A. 1989).

[26] *Hadlick*, slip op. at 3.

[27] *Id.*, slip op. at 4. During his providence inquiry, Hadlick admitted that his conduct was service discrediting and prejudicial to good order and discipline.

[28] 417 U.S. 733, 759 (1974).

[29] *Levy*, 417 U.S. at 758.

would refuse to go to Vietnam if so ordered and that "[i]f he were a colored soldier" he would refuse to fight in Vietnam. The Army charged and convicted Levy for violating articles 133 and 134 because of his statements.

On appeal, Levy claimed that articles 133 and 134 were overbroad and violated the first amendment. The Court, however, rejected Levy's claim, noting that "the military is, by necessity, a specialized society separate from civilian society." The Court then went on to cite with approval from the Court of Military Appeals' decision in *United States v. Priest*:[30]

> In the armed forces some restrictions exist for reasons that have no counterpart in the civilian community. Disrespectful and contemptuous speech, even advocacy of violent change, is tolerable in the civilian community, for it does not directly affect the capacity of the Government to discharge its responsibilities unless it both is directly related to inciting imminent lawless action and is likely to produce such action. *Brandenburg v. Ohio*[31]. In military life, however, other considerations must be weighed. The armed forces depend on a command structure that at times must commit men to combat, not only hazarding their lives but ultimately involving the security of the Nation itself. Speech that is protected in the civil population may nonetheless undermine effectiveness of response to command. If it does, it is constitutionally unprotected.[32]

The Court found both articles 133 and 134 constitutional and, consequently, upheld Levy's conviction for disloyal statements.

The Court also has been deferential to the military in other areas of first amendment concern. An example of this deference appeared in *Goldman v. Weinberger*.[33] Goldman, an Orthodox Jew and ordained rabbi, who also served as a commissioned officer in the Air Force, wore a yarmulke while in uniform. An Air Force regulation prohibited the wearing of "headgear" indoors. When Goldman disobeyed an order to refrain from wearing the yarmulke, he received a letter of reprimand from his commander. His commander also gave Goldman a negative recommendation for an extension of his active service term. Goldman sued, claiming that the Air Force had infringed his first amendment freedom to exercise his religious beliefs.

The Supreme Court rejected Goldman's claim. The Court stated:

> Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society. The military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps. The essence of military service "is the subordination of the desires and interests of the individual to the needs of the service."[34]

The Court, giving "great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest," held that the first amendment did not require accommodation of Goldman's religious practices.[35]

Similarly, in *Greer v. Spock*,[36] the Court upheld a base regulation that prohibited the distribution of publications at Fort Dix, New Jersey. The Court noted that "the business of a military installation like Fort Dix [is] to train soldiers, not to provide a public forum."[37] The Court concluded that "[t]he notion that federal military reservations, like municipal streets and parks, have traditionally served as a place for free public assembly and

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[30] *Id.* at 758-59 (citing *Priest*, 45 C.M.R. 335, 344 (C.M.A. 1972)). A court-martial convicted Priest of making disloyal statements in an underground newspaper he published. The Court of Military Appeals, in affirming Priest's conviction, noted the importance of balancing "between the essential needs of the armed services and the right to speak out as a free American." *Priest*, 45 C.M.R. at 344.

In *United States v. Gray*, 42 C.M.R. 255 (C.M.A. 1970), the accused made several disloyal statements, including the statement that the Constitution was a "farce." The court, in affirming, stated that "the public making of a statement disloyal to the United States, with the intent to promote disloyalty and disaffection among persons in the armed forces and under circumstances to the prejudice of good order and discipline, is not speech protected by the First Amendment and is conduct in violation of Article 134 ..." *Gray*, 42 C.M.R. at 258; *see also* United States v. Daniels, 42 C.M.R. 131 (C.M.A. 1970); United States v. Harvey, 42 C.M.R. 141 (C.M.A. 1970).

[31] 395 U.S. 444 (1969).

[32] *Levy*, 417 U.S. at 758-59 (citing *Gray*, 42 C.M.R. 255).

[33] 475 U.S. 503, 106 S. Ct. 1310 (1986).

[34] *Goldman*, 106 S. Ct. at 1313 (citing *Orloff v. Willoughby*, 345 U.S. 83, 92 (1953)). The Court reaffirmed this principle in *Solorio v. United States*, 483 U.S. 135 (1987).

[35] *Goldman*, 106 S. Ct. at 1314.

[36] 424 U.S. 828 (1976).

[37] *Spock*, 424 U.S. at 838.

communication of thoughts by private citizens is thus historically and constitutionally false."[38]

Both the military and federal courts have accorded the military special deference in assessing claims of alleged unconstitutional application of military regulations. For example, the Court of Military Appeals recently upheld the conviction of an officer under article 133 for wrongfully charging another soldier tutoring fees.[39] The Seventh Circuit upheld the bar to reenlistment of a soldier who declared herself to be a homosexual,[40] and the Ninth Circuit upheld the refusal to process the enlistment package of a member of the Sikh religion who, because of his religious beliefs, could not comply with Army appearance regulations.[41] On the other hand, a district court recently upheld the claim of a Navy reservist that he should be able to communicate with Congress on official Navy letterhead and in his official capacity.[42]

The teaching of these cases dealing with the regulation of speech and the other first amendment rights of service members is that the courts will give great deference to accepting the military's professional judgment concerning the need for regulation. Authorities must evaluate Clayton Dugout's conduct against that backdrop.

Using the Supreme Court's analysis in *Johnson*, the Army clearly may punish Clayton's flag burning under the Uniform Code of Military Justice. Clayton's conduct was expressive—that is, he was expressing his view that the military powers and, to a large extent, the United States and its Army, are responsible for the world's problems. Because Clayton's conduct was expressive, the next question is whether article 134's prohibition against conduct detrimental to good order and discipline or conduct detrimental to the preservation of the reputation of the armed forces, "is related to the suppression of free expression,"[43] or "protect[s] a substantial Government interest unrelated to the suppression of free expression."[44]

While article 134 may limit expression, limiting speech clearly is not its primary purpose. Instead, the article's purpose—as well the purpose of the entire Uniform Code of Military Justice—is to maintain discipline, so that the military is "capable of performing [its] mission promptly and reliably."[45] Little question exists that a flag burner in the ranks will "undermine the effectiveness of response to command" and interfere with military effectiveness. Indeed, conduct such as flag burning strikes at the very heart of good order and discipline. Imagining the abuse Clayton would receive from other military personnel in his command would not be difficult. Predictably, a breach of the peace would result, not only between Clayton and those who found his conduct despicable, but also between Clayton's detractors and admirers. Finally, any trust in Clayton's ability and desire to defend his fellow soldiers—let alone his country—in combat would be questionable. Similarly, his fellow soldiers' ability and desire to come to Clayton's aid, if necessary, would be equally tenuous.

Finally, and importantly, Clayton's burning the flag was expressive *conduct*. As the Supreme Court noted in *Johnson*, "[t]he Government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word."[46] Thus, if the military may suppress dissent and disloyal statements communicated by the written or spoken word, as it did in *Levy*, *Priest*, and other cases, then it obviously may suppress dissent and disloyal activity communicated through expressive conduct such as burning the flag.

This military interest, unrelated to free expression, is sufficient to survive judicial analysis, especially in light of the deference with which the courts view the applica-

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[38] *Id.*; *accord* Brown v. Glines, 444 U.S. 348 (1980) (Air Force regulation prohibiting solicitation of signatures by service member is constitutional because the "restrict[ed] speech no more than is reasonably necessary to protect the substantial governmental interest"); *see also* Rostker v. Goldberg, 453 U.S. 55 (1981) (upholding Congress's decision to reject registration of women for selective service, noting that in context of military affairs, Supreme Court has accorded Congress "greater deference"); Chappell v. Wallace, 462 U.S. 296 (1983) (rejecting enlisted service members' claim for damages for officers' allegedly violating service members' constitutional rights, stating that "[t]he special nature of military life—the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel—would be undermined by a judicially created remedy exposing officers to personal liability at the hands of those they are charged to command").

[39] United States v. Lewis, 28 M.J. 179 (C.M.A. 1989).

[40] Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989).

[41] Khalsa v. Weinberger, 787 F.2d 1288 (9th Cir. 1985).

[42] Banks v. Ball, 705 F. Supp. 282 (E.D. Va. 1989). Several other cases address the constraints on constitutional rights in the military. *See* United States v. Womack, 29 M.J. 88, 91 (C.M.A. 1989) ("First Amendment and related concerns of privacy apply differently to the military community because of the unique mission and need for discipline); Unger v. Ziemniak, 27 M.J. 349, 357 n.17 (C.M.A. 1989) ("mandatory drug testing in the military community is not necessarily subject to the same limitations that would be applicable in the civilian society"); United States v. Bickel, 30 M.J. 277 (C.M.A. 1990) (military status of service members may be decisive in establishing that they are subject to routine urinalysis inspections).

[43] *Johnson*, 109 S. Ct. at 2538.

[44] *Glines*, 444 U.S. at 354.

[45] *Id.*

[46] *Johnson*, 109 S. Ct. at 2540.

ble military regulations.[47] "The fundamental necessity for obedience, and the consequent necessity for imparition of discipline"[48] combine to provide ample justification for punishing flag burning and other forms of flag desecration by service members.

Conclusion

Although one commentator has intimated that flag desecration is not punishable under the Uniform Code of Military Justice,[49] an objective analysis of *Texas v. Johnson* and cases applying the first amendment in the military indicates otherwise. Expressive conduct such as flag burning is incompatible with the military mission. Accordingly, *Texas v. Johnson* has no application to courts-martial.

[47]Many of the justices on the Supreme Court view military regulations so deferentially that Justice Brennan complained that "[i]f a branch of the military declares one of its rules sufficiently important to outweigh a service person's constitutional rights, it seems that the Court will accept that conclusion no matter how absurd or unsupported it may be." *Goldman*, 106 S. Ct. at 1317.

[48]*Levy*, 417 U.S. at 760.

[49]Note, *Flag Desecration in the Army*, The Army Lawyer, Apr. 1990, at 25-6.

Avoidable Appellate Issues—The Art of Protecting the Record

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Introduction

Few things are more disappointing to a trial counsel, a chief of military justice, or a staff judge advocate (SJA) than to see a conviction reversed, a sentence set aside, or a case returned for a new review and action. Furthermore, that disappointment often leads to frustration when the case was one in which government counsel could have avoided the error. Appellate issues that government counsel cannot avoid, such as sufficiency of the evidence or fourth amendment issues, are beyond the purview of this article. Avoidable appellate issues arise when a trial counsel, a chief of military justice, or an SJA make inadvertent mistakes or omissions that violate the procedural requirements of the Rules for Courts-Martial (R.C.M.). Time and time again, however, these simple, and sometimes minute matters, cause the appellate courts to return cases to a convening authority for corrective action or retrial.

Moreover, in some cases, appellate counsel must obtain affidavits from counsel, the SJA, the convening authority, and others to explain things that never should have happened. This results in additional work by the SJA and his staff, not to mention the considerable amount of time expended in cases in which a new review and action or retrial are necessary.[1] In short, avoidable appellate issues cause an unnecessary waste of time at all levels in the military justice system, even when they do not result in appellate relief. The goal of all parties concerned should be to avoid having any of these issues raised in the first place.

This article will highlight several common issues repeatedly raised at the appellate level that counsel could have avoided. The author does not intend this article to offend anyone; rather, the article's intent is to bring these issues to the forefront so that trial counsel, chiefs of military justice, and staff judge advocates will take the steps necessary to eliminate them from appellate scrutiny.

For simplicity, the article divides avoidable appellate issues into three categories: procedural, sentencing, and post-trial. Each category contains several issues that this article will discuss. The order in which the article addresses these issues bears no relationship to their importance or to the frequency with which they have arisen on appeal. Rather, the order simply follows the normal course of events at trial.

Procedural Issues

1. *Detailing of the Military Judge*: R.C.M. 503(b)(2)[2] requires that the record of trial contain an announcement indicating who detailed the military judge. Usually, at the first session of trial, the military judge will announce that he either detailed himself to the case or that the chief circuit judge in that particular jurisdiction detailed him.

[1]When the court orders a new review and action the accused technically is entitled to some amount of back pay if the initial action included any forfeiture of pay. *See* Bross, *Don't Let The Finance Office Ignore a New Review and Action*, The Army Lawyer, July 1988, at 43.

[2]Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 503(b)(2) [hereinafter R.C.M.].

While the method of detailing the judge may seem like a trivial point, it often arises on appeal. The appellants in these cases usually assert that the failure to detail properly a military judge rendered the court without jurisdiction. Even though the Army Court of Military Review has held that "the failure to announce the identity of the detailing authority alone does not constitute jurisdictional error,"[3] counsel should avoid this error and the issue it presents. Accordingly, trial counsel should ensure that the military judge announces the method of detail. Counsel should pay particular attention if one judge did the arraignment and another judge sits for the trial. The second judge also must announce his detailing authority.

2. *Right to Counsel*: R.C.M. 901(d)(4)(A) requires the military judge to advise the accused of his right to representation by detailed military counsel or by civilian counsel at no expense to the government. While seemingly hard to believe, the military judge occasionally omits this rather routine matter. The military judge should follow the "boilerplate" contained in the *Military Judges' Benchbook*[4] (*Benchbook*) in advising the accused of his rights, and the trial counsel should monitor this process. Counsel should bring any deviations from the *Benchbook* to the military judge's attention.

3. *Detailing of Members*: This area of the law has caused a considerable amount of appellate litigation. Most of the litigation involves the excusal of members or the changing of members. R.C.M. 505(c) provides that the convening authority may delegate the authority to excuse members to the staff judge advocate. Pursuant to that authority, SJAs routinely excuse members for a variety of reasons. An avoidable appellate issue occurs, however, when the trial counsel fails to announce on the record that the SJA has excused the absent members. Counsel easily can solve the issue by proffering an affidavit from the SJA. An affidavit would not be necessary if the trial counsel accounts for all members detailed to the case, including those members excused by the SJA.

Counsel also should exercise care whenever changing members. In the typical situation, when the convening authority changes members, the trial counsel will have a new convening order prepared and inserted into the record. The trial counsel must ensure that he or she informs the court that the new convening order properly detailed the members who do not appear on the original convening order. Announcing these matters on the record will avoid issues on appeal.

Errors in the substitution of members have caused appellate courts to reverse and return several cases for new trials. In *United States v. Roldan*,[5] for instance, the convening authority selected panel members for cases going to trial from the date of his order for approximately one year. The convening authority also selected alternate panel members who would sit, automatically, if certain circumstances existed. In particular, certain enlisted members would sit only if the number of enlisted members on a panel fell below three or below one-third of the panel's membership.

Unfortunately, two enlisted members from the alternate pool sat on the case, despite the fact that neither contingency occurred. Hence, the two enlisted members were interlopers because the convening order did not operate to detail them to sit on the case. Accordingly, the court had no choice but to set aside the findings and sentence and order a new trial. The *Roldin* case provides an excellent example of the pitfalls inherent in trying to build "automatic" provisions into the detailing process. Moreover, it also is an excellent example of an error that counsel could have avoided at trial.

4. *Announcing Members*: R.C.M. 813(a)(4) requires the military judge to ensure that someone announces, on the record, the names and ranks of all members present when he or she first calls the court-martial to order. Typically, this duty falls upon the trial counsel. Unfortunately, the trial counsel occasionally announces the names of the military judge, defense counsel, and trial counsel, but fails to announce the names and ranks of the members present. In one case, the trial counsel merely stated that all personnel detailed by the convening authority were present and that no person was absent.

On appeal, appellate defense counsel predictably will assert that the members, who the trial counsel failed to identify by name on the record, were interlopers; therefore, the appellate court should rule that the courts-martial proceedings were a nullity. Fortunately, in these cases, the Army Court of Military Review normally can establish, by logical inferences drawn from the proceedings, that only detailed members sat. Without these inferences to establish membership, however, an appellant may prevail. Accordingly, trial counsel must ensure that they announce the full names and ranks of all detailed members who are present at courts-martial.

5. *Voting Procedures*: Within the last year numerous records have contained errors concerning the voting procedures that members had to use during their findings or sentence deliberations. Each error was a direct result of the military judge's deviating from the standard *Benchbook* instructions. A typical error concerns the military judge's instruction that the junior member collect and count the number of ballots cast, rather than the votes.[6]

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[3] United States v. Hutto, 29 M.J. 917, 919 (A.C.M.R. 1989); *see also* United States v. Smith, CM 8902571 (A.C.M.R. 23 July 1990) (unpub.).

[4] Dep't of Army, Pam. 27-9, Military Judges' Benchbook, ch. 2, (1 May 1982) [hereinafter *Benchbook*]; *see also* Manual for Courts-Martial, United States, 1984, Appendix 8. Some judges deviate from the *Benchbook*, but whichever guide a judge uses should cover the sequence of events at trial and all Manual for Courts-Martial requirements.

[5] United States v. Roldan, CM 8901385 (A.C.M.R. 19 Jan. 1990) (unpub.).

[6] *See* R.C.M. 921(c)(6)(B); 1006(d)(3)(B) ("The junior member shall collect the ballots and count the votes. The president shall check the count and inform the other members of the result").

On appeal, appellate defense counsel asserted that this defective instruction constituted plain error[7] that denied the appellant substantial procedural safeguards. The Army Court of Military Review held that the instruction did not amount to plain error.[8] Again, however, counsel easily could have avoided the issue had counsel monitored the military judge carefully when he read from the *Benchbook*. Trial counsel should be alert during the trial for deviations from the standard *Benchbook* instructions. If an instructional error occurs, trial counsel should advise the military judge so that he or she simply can reinstruct the members, and thereby avoid this unnecessary appellate issue.

Recently, the Army Court of Military Review decided two cases in which omissions in the voting instructions given by the military judge warranted a rehearing on sentence.[9] In these cases, the military judge failed to inform the members that they would vote by secret written ballot, that the junior member would collect and count the votes, and that the president of the court would check the count. The appellate court held that the military judge's failure to advise the members of these procedural requirements constituted plain error. The court returned each case to the convening authority for a new sentence hearing. The government could have avoided the time and expense of these resentencing hearings had counsel caught these errors at trial.

6. *Guilty Plea Inquiries*: R.C.M. 910(c)(4) requires the military judge to advise the accused that by pleading guilty he waives his rights against self-incrimination, to a trial of the facts, and to confront the witnesses against him. Once again, the military judge has omitted this rather routine advice in a few cases. Although the court found the omission to be harmless based upon other matters in the record, the omission created an issue that counsel easily could have avoided. The trial counsel should have "followed along" in the *Benchbook* as the military judge advised the accused of his rights. Following this procedure, the trial counsel immediately should bring any inadvertent omission to the military judge's attention. This practice will avoid unnecessary issues on appeal.

Another avoidable issue in this area is whether the military judge conducted a proper inquiry as required by *United States v. Care*.[10] The military judge must conduct an inquiry of the accused concerning each offense to establish a factual basis for the plea.[11] In two recent records of trial, the military judge completely failed to discuss a charged offense with the accused. Both cases dealt with numerous charges and specifications; however, something apparently distracted the military judge, causing him to miss one specification. The Army Court of Military Review set aside the finding of guilty on that charge and specification. Trial counsel must remain vigilant during the providence inquiry and use a checklist, if necessary, to ensure that the military judge covers each offense during these inquiries.

Sentencing Issues

1. *Request for Discharge*: When an accused requests a punitive discharge during the sentencing portion of a trial, the military judge must advise him of the adverse effects of a discharge and determine whether he truly desires that discharge.[12] This normally occurs when the accused is trying to obtain a discharge rather than confinement.

In the most recent case addressing this issue, the military judge determined only whether the accused truly desired the discharge. The military judge failed to explain the adverse consequences of a punitive discharge to the accused. Nevertheless, the appellate court found that, despite the military judge's omission, the record left no doubt that the accused understood the ramifications of a punitive discharge. At trial, however, when government counsel hears the defense requesting a punitive discharge, he or she should make sure that the military judge properly questions the accused about the requested discharge in accordance with *United States v. Butts*.[13]

2. *Forfeitures*: Numerous avoidable appellate issues deal with forfeitures adjudged at trial. The most common error is that the military judge or the panel fails either to state the forfeitures adjudged in a dollar amount or to state the specific number of months the forfeitures will cover. For example, expressing forfeitures as "two-thirds pay" is improper. Similarly, stating that forfeitures will last for a specified number of years or days is also improper. R.C.M. 1003(b)(2) provides that a sentence to forfeitures shall state the exact amount in *whole dollars* that the accused shall forfeit each month and the *number of months* that the forfeitures will last.

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[7] *See* Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 103(d) [hereinafter Mil. R. Evid.]. Mil. R. Evid. 103(d) defines plain error as an error that materially prejudices substantial rights of the accused. If plain error exists, the appellate court will set aside a finding or sentence. *See* Uniform Code of Military Justice art. 59(a), 10 U.S.C. § 859(a) (1988) [hereinafter UCMJ].

[8] *See* United States v. Kendrick, 29 M.J. 792 (A.C.M.R. 1989); United States v. Hampton, CM 8902596 (A.C.M.R. 10 July 1990) (unpub.); United States v. Bowen, CM 8900240 (A.C.M.R. 30 Jan. 1990) (unpub.).

[9] United States v. Harris, 30 M.J. 1150 (A.C.M.R. 1990); United States v. Ross, CM 8903041 (A.C.M.R. 16 July 1990) (unpub.).

[10] United States v. Care, 40 C.M.R. 247 (C.M.A. 1969).

[11] *See* R.C.M. 910(e).

[12] *See* United States v. Butts, 25 M.J. 535, 537 (A.C.M.R. 1987).

[13] *Id.* at 137.

Trial counsel should ensure that the sentence adjudged at trial is in accordance with R.C.M. 1003. The military judge can take action to correct any deviations at trial. In addition, the convening authority can take corrective action on errors that counsel or the judge fail to notice at trial. Chiefs of military justice and staff judge advocates also should watch for these errors. Having the convening authority take corrective action, if necessary, will prevent the issue from arising at the appellate level.

Another common error raised on appeal concerns a sentence that provides for forfeiture of all pay and allowances, but no confinement. The convening authority, however, may not approve a sentence of total forfeitures when the court-martial does not adjudge confinement.[14] Again, chiefs of military justice and staff judge advocates should watch for this error so that the convening authority can correct the error before it faces appellate scrutiny.

Post-trial Issues

1. *Service of Record of Trial on Accused*: R.C.M. 1104(b) requires the government to serve the authenticated record of trial on the accused. Moreover, the accused's receipt for a copy of the record of trial must be attached to the original record.[15] When the record does not contain this certificate of service, the accused could assert an error on appeal.

Investigation into this matter often reveals that the government actually served an authenticated copy of the record upon the accused or that substitute service upon the defense counsel occurred. Counsel easily can resolve this issue by obtaining the certificate of service or the certificate of substitute service. Many times, however, government counsel simply and inadvertently fail to ensure that a clerk inserts the certificate or receipt in the record. Counsel should exercise greater care in the preparation of the record of trial to ensure that the required certificates appear therein; a complete record will avoid issues concerning service of the authenticated transcript.[16]

2. *SJA Recommendation*: R.C.M. 1106(f)(1), as amended,[17] requires the government to serve a copy of the staff judge advocate's recommendation to the convening authority on both the defense counsel and the accused. Recently, appellate counsel and judges have devoted a great deal of attention to this new requirement. The error raised on appeal is that, even though the record clearly reveals that the defense counsel received a copy of the SJA recommendation, the record of trial fails to demonstrate affirmatively that a government representative personally served a copy of the SJA recommendation on the accused.[18]

R.C.M. 1106(f)(1) does not require the record of trial to contain an affirmative showing that the government personally served a copy of the recommendation upon the accused. Actually, R.C.M. 1106(f)(1) specifically states that the government shall attach a statement to the record only in the event that service upon the accused is impracticable. Relying upon this language, the Government Appellate Division has asserted before the Army Court of Military Review that the court should not impose an additional administrative burden upon the SJA to attach yet another certificate of service to the record.

The court has not decided this issue. However, while a silent record may support a presumption of proper service upon the accused, caution would dictate that the record reflect service of the SJA recommendation under all circumstances. As a suggestion, counsel could use one certificate of service form to reflect service upon the accused of both the authenticated record of trial and the SJA recommendation.

3. *Defense Submissions to the Convening Authority*: R.C.M. 1107(b)(3)(A) requires that the convening authority consider any matters submitted by the accused under R.C.M. 1105 or R.C.M. 1106(f) before taking action on the case. Every month the Government Appel-

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[14] *See* United States v. Warner, 25 M.J. 64 (C.M.A. 1987); R.C.M. 1107(d)(2) discussion.

[15] *See* R.C.M. 1104(b)(1)(B).

[16] On several occasions, when the defense raised this issue at the appellate level, the government found the certificate of service in the original record but not in the required copies of the record forwarded to the Clerk of the Court. Ensuring that the copies of the original record of trial are complete is extremely important.

[17] Executive Order 12708, dated 23 March 1990, amended R.C.M. 1106(f)(1), with an effective date of 1 April 1990. As amended, R.C.M. 1106(f)(1) provides as follows:

> Before forwarding the recommendation and the record of trial to the convening authority for action under R.C.M. 1107, the staff judge advocate or legal officer shall cause a copy of the recommendation to be served on counsel for the accused. A separate copy will be served on the accused. If it is impracticable to serve the recommendation on the accused for reasons including but not limited to the transfer of the accused to a distant place, the unauthorized absence of the accused, or military exigency, or if the accused so requests on the record at the court-martial or in writing, accused's copy shall be forwarded to the accused's defense counsel. A statement shall be attached to the record explaining why the accused was not served personally.

[18] *See* R.C.M. 1103(b)(3)(G) (requiring government to attach proof of service certificate to record thereby verifying that defense counsel actually received copy of SJA recommendation).

late Division continues to receive cases in which the appellant alleges that the convening authority failed to consider defense submissions prior to taking action. The Army Court of Military Review has stated clearly that it will send cases back for a new review and action when the record is unclear as to whether the convening authority considered the defense submissions.[19]

Chiefs of military justice and staff judge advocates carefully should follow certain procedures to avoid these issues on appeal.[20] In the SJA recommendation, no acknowledgement of defense submissions should appear unless they actually existed when the SJA prepared his recommendation. When defense submits matters under R.C.M. 1105 or R.C.M. 1106(f), the SJA then should prepare an addendum to his recommendation stating that matters submitted by the defense are attached to the addendum and that the convening authority must consider these matters before taking action on the case. If the defense submission alleges no legal errors, R.C.M. 1106 requires no further comment. If, however, the defense matters allege legal errors in the accused's trial, the addendum must address those errors in the manner required by R.C.M. 1106(d)(4). Finally, counsel not only should attach the matters submitted by the defense to the addendum, but also should *list* the matters submitted by the defense as an attachment to the addendum.

Many of the cases raising this issue on appeal have reflected this practice, except that the addendum did not list the defense submissions as attachments to the addendum. The defense argument in these cases is that the record still fails to indicate clearly that the convening authority received the defense submissions for his consideration. Therefore, listing the defense submissions as attachments to the addendum is extremely important. Counsel should list defense submissions item by item, with an appropriate title or description for each item, so that no doubt that the SJA presented them to the convening authority appears in the record. Following this procedure should remove the issue from appellate scrutiny.

4. *Approval of the Discharge*: The wording of the convening authority's action has been the basis of several appellate issues that counsel easily could have avoided. As an example, in one case the convening authority's action stated in pertinent part, "only so much of the sentence as provides for reduction to the grade of Private E1, to forfeit all pay and allowances, and to be confined for two years is approved and, except for the dishonorable discharge, will be executed." The allegation on appeal was that the convening authority failed to approve any discharge, and therefore the Army Court of Military Review could not affirm the dishonorable discharge adjudged at trial.[21]

The court held that upon a review of the record, no doubt existed that the convening authority intentionally approved the discharge.[22] Therefore, the court affirmed the sentence adjudged at trial, which included the dishonorable discharge. Chiefs of military justice and staff judge advocates must review the convening authority's action carefully to avoid these types of appellate issues. The convening authority obviously would not find humor in the appellate court's setting aside a dishonorable discharge due to a simple omission or ambiguity in the action that his SJA prepared for him.[23]

Conclusion

Trial counsel, chiefs of military justice, and SJAs could have avoided all of the appellate issues discussed in this article. Actually, trial counsel could have avoided nearly half of these issues by carefully listening as the military judge went through the "boilerplate." When the judge does not follow the *Benchbook*, the trial counsel's duty to protect the record is all the more difficult to carry out. If a judge routinely deviates from the "boilerplate," the SJA should detail two trial counsel to courts-martial so that at least one can give full attention to what the judge is saying in court.

Protecting the record of trial from avoidable appellate issues is a full-time job. It requires the trial counsel, chief of military justice, and the staff judge advocate to keep a watchful eye over each case tried and each record prepared. It also requires appellate attorneys to provide feedback to trial counsel and their supervisors so that the government will avoid these unnecessary issues in future trials.

Working together, counsel representing the government can prevent these types of issues from facing appellate scrutiny. Appellate courts no longer should have to

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[19] United States v. Hallums, 26 M.J. 838 (A.C.M.R. 1989); *see also* United States v. Craig, 28 M.J. 321 (C.M.A. 1989).

[20] *See* United States v. Foy, 30 M.J. 664, 665 (A.F.C.M.R. 1990) (suggesting procedure to follow to avoid R.C.M. 1107(b)(3)(A) issues on appeal).

[21] The convening authority's action should have stated the following:

> Only so much of the sentence as provides for reduction to the grade of Private E1, total forfeiture of all pay and allowances, confinement for a period of two years, and *a dishonorable discharge* is approved and, except for the part of the sentence extending to the dishonorable discharge, will be executed.

[22] *See* United States v. Rutherford, CM 8901786 (A.C.M.R. 22 Feb. 1990) (unpub.); *see also* United States v Madden, CM 8902053 (A.C.M.R. 22 Feb. 1990) (unpub.).

[23] *See* United States v. McIntosh, 25 M.J. 837 (A.C.M.R. 1988) (affirming only a bad conduct discharge, rather than the dishonorable discharge adjudged at trial, due to ambiguity of convening authority's action). In *United States v. Lower*, 10 M.J. 263 (C.M.A. 1981), the convening authority's action was silent concerning approval or disapproval of the punitive discharge. Noting that it could resolve the ambiguity only by clarifying the intent of the authority who took the action, the appellate court felt "compelled," in the absence of any such communication, to affirm only the portion of the sentence that did not provide for a punitive discharge. *See id.*

return cases to a convening authority for a new review and action or rehearing simply because of an avoidable appellate issue. Likewise, appellate counsel no longer should have to request the trial counsel, the SJA, or the convening authority to spend their valuable time preparing affidavits to respond to an avoidable appellate issue. These goals are attainable. Keeping a watchful eye at the trial level can and should avoid these issues in the future and save an unnecessary waste of time at all levels in the military justice system.

GAD Note

The *Dunlap* Rule: Post-trial Delays May Result in Dismissal

Introduction

The Court of Military Appeals, in *Dunlap v. Convening Authority*,[1] found that a presumption that the government has denied an accused speedy disposition of a case will arise when an accused remains under continuous restraint after trial and the convening authority fails to promulgate the formal and final action within ninety days after the commencement of that restraint. The Court of Military Appeals placed a heavy burden on the government to show diligence and stated that, in the absence of such a showing, the court would dismiss the charges.[2] In *Dunlap* the court found a delay of eleven months to be deleterious and prejudicial to the interests of justice.[3] The court reasoned that "Congress has left no doubt that it desires that all proceedings in the military criminal justice system be completed as expeditiously as the circumstances allow. This Court is obligated to preserve and protect the integrity of its mandate for timely justice." [4] The presumption against the government, however, is rebuttable.[5] The *Dunlap* court concluded that the "petitioner is entitled to extraordinary relief to preserve the integrity of the courts-martial system and to protect him against further deprivation of his liberty and rights under the Uniform Code."[6]

The *Dunlap* Progeny

In *United States v. Banks*[7] the Court of Military Appeals departed from the paternalistic approach of *Dunlap* and found that "delay of final actions by the convening authority will be tested for prejudice." Therefore, since *Banks*, the ninety day per se rule of *Dunlap* no longer has applied. An appellant now must demonstrate how the government prejudiced his case and the Court of Military Appeals has placed a greater emphasis on determining if the appellant suffered any specific prejudice.[8] Chief Judge Everett, writing the opinion of the Court of Military Appeals in *United States v. Clevidence*,[9] determined that a 261-day delay from sentencing until authentication of the record evidenced a gross dereliction and ineptitude on the part of the government.[10] Moreover, the court found that because Clevidence had served seventy-seven days of a ninety day sentence, and because he apparently lost civilian employment because employees were concerned that the

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[1] 48 C.M.R. 751 (C.M.A. 1974).

[2] *Id.* at 754.

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] 7 M.J. 92 (C.M.A. 1979).

[8] *See* United States v. Diamond, 18 M.J. 305 (C.M.A. 1984); United States v. Thomas, 8 M.J. 1 (C.M.A. 1979).

[9] 14 M.J. 17 (C.M.A. 1982).

[10] *Clevidence*, 14 M.J. at 18.

Army might call him back to active duty, the government had prejudiced Clevidence's case.[11] Accordingly, the court set aside the findings and sentence, and dismissed the charges against him.

In *United States v. Sutton*[12] the Court of Military Appeals' Chief Judge Everett, again writing the opinion of the court, examined *Clevidence* and *Dunlap* and found that the government had prejudiced Sutton, like Clevidence, in obtaining civilian employment.[13] The *Sutton* court found the loss of civilian employment to justify dismissal of the charges, just as the *Dunlap* court found the convening authority's failure to exercise his supervisory authority in authenticating and correcting the record to require dismissal.[14] In *Sutton* the government delayed the case for 321 days. The *Sutton* court emphasized that in *Clevidence* "we wished to discourage a return to the intolerable delays that persuaded the Court to adopt the [*Dunlap*] presumption," and that "to help prevent such an occurrence, the Court should be vigilant in finding prejudice wherever lengthy post-trial delay in review by a convening authority is involved."[15]

Chief Judge Everett also wrote the opinion of the Court of Military Appeals in *United States v. Shely*.[16] In *Shely* the court found that the appellant amply demonstrated prejudice resulting from a 439-day delay, in a case marked by administrative bungling and indifference. Accordingly, the court set aside Shely's conviction and dismissed the charges. Chief Judge Everett opined, "This appeal is another of a disturbing number of cases involving intolerable delay in the post-trial processing of courts-martial which have arisen since this Court in *United States v. Banks*, ... withdrew from the "inflexible application" ... of *Dunlap*."[17]

In addition to the Army court's opinions, the Coast Guard Court of Military Review has been particularly active in the area of scrutinizing post-trial delays and has published three cases of importance: *United States v. Madison*,[18] *United States v. Ernest*,[19] and *United States v. McGinn*.[20]

In *Madison* the Coast Guard court found prejudice when the government's negligent post-trial processing of the case resulted in the court's remanding the case and reviewing it twice over a three-year period. However, instead of dismissing the charges—as the Army court did in *Dunlap*—the Coast Guard court in *Madison* disapproved only the sentence because of the seriousness of the drug charges against Madison.[21] In *Ernest* the Coast Guard court found that "[a]ny prejudice the appellant may have suffered due to the unacceptable delay in the convening authority's action in his case will be cured by our reassessment of the sentence."[22] Again, as in *Madison*, the Coast Guard court found that other matters militated against an outright dismissal of the charges against Ernest. The *Ernest* court, however, did not test for prejudice consistent with *Banks*. In *McGinn* the Coast Guard court expressed its displeasure with *Clevidence* and found that the government prejudiced McGinn by his "claimed impairment of his ability to obtain employment."[23] However, because of the seriousness of McGinn's crimes—larceny of seized contraband (marijuana)—the court determined that it should limit the appropriate remedy to disapproval of the sentence and not order dismissal.[24]

Presently, one case is pending before the Court of Military Appeals that may illuminate this issue of post-trial delays and prejudice to appellants: *United States v. Dunbar*.[25] In *Dunbar* the Navy and Marine Court of Mili-

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[11] *Id.* at 19.

[12] 15 M.J. 235 (C.M.A. 1983).

[13] *Id.* at 236.

[14] *Id.*

[15] *Id.* at 236 (citations omitted).

[16] 16 M.J. 431 (C.M.A. 1983).

[17] *Id.* (citations omitted).

[18] 20 M.J. 860 (C.G.C.M.R. 1985).

[19] 17 M.J. 835 (C.G.C.M.R. 1984).

[20] 17 M.J. 592 (C.G.C.M.R. 1983).

[21] *Madison*, 20 M.J. at 861-62.

[22] *Ernest*, 17 M.J. at 838 (citing *McGinn*, 17 M.J. at 594).

[23] *McGinn*, 17 M.J. at 594.

[24] *Id.* at 595.

[25] 28 M.J. 972 (N.M.C.M.R. 1989), *review granted*, 29 M.J. 441 (C.M.A. 1989).

tary Review found that Dunbar's case had languished for 1097 days without explanation.[26] The court "reviewed the record of trial in its entirety and the assignment of error" and found no prejudice.[27] The court further found that,

> [e]ven if prejudice as a result of inordinate delay occurred at the appellate level, dismissal of the charges is appropriate *only* when some error in the trial proceedings requires corrective action and the appellant would be prejudiced in the presentation of his case at a rehearing or when no useful purpose would otherwise be served by continuing the proceedings.[28]

The Navy and Marine court found in *Dunbar* that "pursuant to our fact-finding responsibility under Article 66(c), UCMJ, we are not required to accept without question an appellant's vague and unsubstantiated assertions as factually sufficient to establish specific prejudice if they are unsupported by the record."[29] Finally, the court issued its warning that "[t]his Court will hold the Government accountable, where appropriate, and as it has in the past, for its negligence in the handling of a case at the appellate, or any other review, level."[30]

Conclusion

Recent Army Court of Military Review unpublished opinions have cited *Dunbar* with approval. Chiefs of military justice and trial counsel should read this case and heed its warnings. Also, counsel should demand that the accused personally request any post-trial delays in writing. Documenting post-trial submissions and delays submitted by the accused and his defense counsel, coupled with the expeditious and orderly post-trial processing of cases by the government, will protect the interests of justice and eliminate needless *Dunlap* claims. Major Martin D. Carpenter.

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[26] *Id.* at 975.

[27] *Id.*

[28] *Id.* at 975 (citing United States v. Green, 4 M.J. 203, 204 (C.M.A. 1988) and United States v. Gray, 47 C.M.R. 484 (C.M.A. 1973)).

[29] *Id.* at 980.

[30] *Id.* at 981 (citations omitted).

Regulatory Law Office Item

The Regulatory Law Office (JALS-RL) has moved to the new Army Litigation Center at 901 N. Stuart Street, ATTN: DAJA-RL, Suite 400, Arlington, VA 22203-1837. The telephone number is AUTOVON 226-1660 or commercial (703) 696-1660. The Regulatory Law Office continues to work with concerned personnel of the Army, DOD, and the General Service Administration (GSA), as well as counsel for other military departments and major Army commands, to handle cases involving regulated transportation, communication, electric, gas, water, and sewer utilities. Concerned personnel at installations should report any rate filings made by utilities to the Regulatory Law Office in accordance with Army Regulation 27-40, Legal Services: Litigation, para. 1-4*g* (4 Dec. 1985, as changed).

Clerk of Court Notes

Who Tried the Most Cases?

For those who are interested in which jurisdictions try the most general and special courts-martial, our calendar year 1989 workload and processing time report yielded the following information: 1st Armored Division sent us 193 records of trial in CY 89. 3d Armored Division was second with 129 records. 21st Theater Army Area Command had 111 cases and 3d Infantry Division had 104. The 8th Infantry Division (Mech) was fifth with 93. Fort Carson and 4th Infantry Division produced 75 records. 7th Infantry Division (Light) and Fort Ord and 5th Infantry Division and Fort Polk each produced 66. VII Corps earned ninth place with 61 records. The US Army Field Artillery Center and Fort Sill was tenth with 60 records.

Erroneous Processing Time Report

In August, the Clerk of Court distributed to major commands the quarterly processing time report for April through June 1990. The report indicated an Armywide average time of eleven days for jurisdictions to dispatch BCD special court-martial records to the Clerk of Court following action by the convening authority. Actually, the average was only six days, which was the same as the dispatch time for general courts-martial.

The higher figure occurred when "the system" picked up a BCD special court-martial which had not adjudged a BCD, but whose record of trial TJAG referred to ACMR. That case was the first application for relief referred under article 69(b) following the 1989 amendment to article 69. The record of trial had not reached the court (from the 19th Support Command) until 452 days after the convening authority's action. That occurred because the jurisdiction did not have to send a record until the accused applied for relief under article 69(b), which the

accused may do at any time within two years following the convening authority's action.

The Clerk of Court expects to prevent these insults to your jurisdiction's processing time by changing the type of court to ordinary special court-martial whenever TJAG refers such cases to ACMR, as the Clerk's office already has done in the case referred after the one mentioned above.

Court-Martial Processing Times, FY 1990

The tables below show the Armywide average processing times for general courts-martial and bad conduct discharge special courts-martial for the first three quarters of Fiscal Year 1990.

General Courts-Martial

	FY 89	1st Qtr	2d Qtr	3d Qtr
Records received by Clerk of Court	1554	409	441	371
Days from charging or restraint to sentence	44	45	40	41
Days from sentence to action	53	55	53	47
Days from action to dispatch	6	6	6	6
Days from dispatch to receipt by the Clerk	11	12	10	7

BCD Special Courts-Martial

	FY 90	1st Qtr	2d Qtr	3d Qtr
Records received by Clerk of Court	497	121	152	86
Days from charging or restraint to sentence	29	30	29	32
Days from sentence to action	45	42	47	44
Days from action to dispatch	4	5	4	6
Days from dispatch to receipt by the Clerk	9	10	9	8

Lately, some jurisdictions have sent incomplete original records, and followed them with required documents (such as defense submissions to the convening authority) that they failed to include with the original record when they dispatched it. When the Clerk of Court receives required documents only after receiving the original record, the Clerk must change the date of dispatch and the date of receipt to the later dates, thereby increasing the number of days from action to dispatch.

COURT-MARTIAL AND NONJUDICIAL PUNISHMENT RATES PER THOUSAND

Third Quarter Fiscal Year 1990; April-June 1990

	ARMYWIDE		CONUS		EUROPE		PACIFIC		OTHER	
GCM	0.46	(1.83)	0.40	(1.61)	0.94	(3.75)	0.34	(1.37)	0.12	(0.50)
BCDSPCM	0.24	(0.94)	0.23	(0.92)	0.33	(1.34)	0.37	(1.50)	0.50	(1.99)
SPCM	0.05	(0.21)	0.04	(0.17)	0.12	(0.49)	0.03	(0.13)	0.00	(0.00)
SCM	0.35	(1.39)	0.36	(1.45)	0.46	(1.83)	0.46	(1.82)	0.25	(0.99)
NJP	26.16	(104.62)	27.84	(111.38)	34.33	(137.31)	30.13	(120.50)	23.10	(92.41)

Note: Based on average strength of 740,922
Figures in parentheses are the annualized rates per thousand

TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

Criminal Law Notes

It's Time to *Care*

In *United States v. Care*[1] the Court of Military Appeals mandated that military judges explain to the accused the elements of the offenses to which he or she is pleading guilty, and that they elicit a factual basis for the guilty plea to ensure that the accused actually is guilty of those offenses. Despite this longstanding requirement, judges

[1] 40 C.M.R. 247 (C.M.A. 1969).

and counsel too often overlook the *Care* inquiry and fail to cover the elements of the offense with specificity. This is especially true concerning article 134 offenses. Two recent examples serve to highlight the problem.

In *United States v. Hitchman*[2] the accused pleaded guilty to wrongfully and willfully discharging a firearm in front of his off post quarters in violation of article 134. As a part of the providence or *Care* inquiry, the military judge advised the accused of all elements of the offense, to include the element that the misconduct had to be prejudicial to good order and discipline in the armed forces or service discrediting.[3] The military judge then proceeded to elicit from the accused an explanation of what he had done and his admission whether the acts constituted the elements of the offense. The judge, however, failed to explain what "conduct prejudicial to good order and discipline" and "service discrediting conduct" meant. Also, the judge failed to elicit any admission from the accused that his conduct met the article 134 standard of being conduct prejudicial or service discrediting.[4]

Because the record of trial in *Hitchman* did not reflect adequately that the accused understood the meaning of that article 134 element or that the accused knowing and intelligently admitted the element, the Army Court of Military Review held that the guilty plea was improvident. *Hitchman* demonstrates that counsel and the military judge must ensure that the accused admits each and every element of the offense to which he or she pleads guilty. "A plea of guilty is not provident unless an accused is willing to admit all essential elements of the offense."[5]

In *United States v. Duval*[6] the accused pleaded guilty to dishonorably failing to pay a just debt in violation of article 134. During the *Care* inquiry, the military judge named each of the elements of the offense, but failed to define the term "dishonorable." Instead, the judge elicited facts from the accused about his failure to pay the debt and concluded that portion of the inquiry with the question: "So you dishonorably failed to pay this debt, is that correct?" The accused answered, "Yes, Your Honor."[7] Moreover, the stipulation of fact, after reciting the failure of the accused to pay the debt, concluded by indicating that the failure to pay the debt was "dishonorable." Accordingly, in *Duval*, the Army Court of Military Review again held that the plea was improvident because the judge failed to elicit a sufficient factual basis.

Within the Army's military justice system, the courts have long held that trial judges cannot conduct the *Care* inquiry in a manner that merely elicits legal conclusions from the accused; instead, the inquiry must elicit facts in the case from which the military judge may conclude that the requisite legal standards exist.[8] In *Duval* the military judge should have elicited facts that reflected that the accused's nonpayment of the debt met the definition of dishonorable—that is, the accused's failure to pay involved deceit, evasion, false promises, deliberate nonpayment, or a grossly indifferent attitude.[9] Counsel and judges must be alert to ensure that an accused does more than agree to legal conclusions posited by the military judge.

How can counsel and judges cure the problem posed by inadequate *Care* inquiries? The answer consists of developing a checklist or standard practice when going through the providence inquiry with an accused. Because the majority of military cases are guilty pleas, counsel and judges must remain mentally alert so that the *Care* inquiry elicits all necessary information.

In *Hitchman*[10] the court indicated a suggested procedure to ensure the providency of a plea regarding the article 134 element of conduct prejudicial to good order and discipline in the armed forces or service discrediting conduct; however, the procedure will work for any offense and any element. First, the military judge should state clearly the elements of the offense. Second, the judge should provide an explanation of the terms at least to the extent contained in the *Military Judge's Benchbook.*[11] Third, the judge should ask if the accused understands the elements of the offense and the definitions of all terms. Fourth, after receiving an affirmative response

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[2] 29 M.J. 951 (A.C.M.R. 1990).

[3] *Id.* at 955.

[4] *Id.* at 956.

[5] United States v. Stener, 14 M.J. 972 (A.C.M.R. 1982).

[6] CM 8903543 (A.C.M.R. 30 Aug. 1990).

[7] *Duval*, slip op. at 2.

[8] United States v. Goins, 2 M.J. 458 (A.C.M.R. 1975); United States v. Michener, 46 C.M.R. 427 (A.C.M.R. 1972).

[9] *Duval*, slip op. at 3.

[10] *Hitchman*, 29 M.J. at 956.

[11] Dep't of Army, Pam. 27-9, Military Judges' Benchbook (1 May 1982).

from the accused on the understanding of the elements and definitions, the judge should ask if the accused admits each element of the offense and whether the elements and definitions taken together accurately describe the accused's conduct. Finally, the judge should elicit statements from the accused that constitute an adequate factual basis for the accused's admission of each element of the offense. Also, if the accused is pleading guilty pursuant to a pretrial agreement that requires him or her to stipulate to the circumstances of an offense, the trial counsel should ensure that the stipulation not only contains the accused's admissions that his or her conduct constituted each and every element of the offense, but also leaves no room for doubt that the accused's actions satisfy the factual basis for the elements and definitions involved in the offense. If the language in the stipulation states more than mere legal conclusions, the stipulation may save an otherwise inadequate providence inquiry on appellate review. LTC Holland.

Pleading, Proving, and Punishing Drunken Driving

Two recent decisions by the Court of Military Appeals, *United States v. Lingenfelter*[12] and *United States v. Scranton*,[13] address the offense of drunken driving under military law. These cases provide useful guidance concerning how the government pleads, proves, and punishes this offense. Before discussing these cases in detail, a brief review of drunken driving in general is appropriate.

Article 111 of the Uniform Code of Military Justice proscribes drunk and reckless driving as follows: "Any person subject to this chapter who operates any vehicle while drunk, or in a reckless or wanton manner, or while impaired by a substance described in section 912a(b) of this title (article 112a(b)), shall be punished as a court-martial may direct."[14] The offense has two elements of proof:

> (1) That the accused was operating[15] a vehicle;[16] and
>
> (2) That the accused was drunk[17] while operating the vehicle, or that the accused operated the vehicle in a reckless[18] or wanton[19] manner, or that the accused was impaired by a substance described in article 112a(b) while operating the vehicle.[20]

The Manual for Courts-Martial provides further that if injury results, the government may add a third "element of proof"[21] that exposes the accused to a greater maximum punishment.[22]

In *Lingenfelter* the evidence established that the accused was driving in excess of the posted speed limit[23] on a clear evening when he struck another vehicle in his path.[24] The accused's view of the other vehicle prior to the accident apparently was unobstructed. The accused's car struck the other vehicle with such force that it liter-

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[12] 30 M.J. 302 (C.M.A. 1990).

[13] 30 M.J. 322 (C.M.A. 1990).

[14] Uniform Code of Military Justice art. 111, 10 U.S.C. § 911 (1982) [hereinafter UCMJ].

[15] The Manual for Courts-Martial defines "operating a vehicle" as including "not only driving or guiding it while in motion, either in person or through the agency of another, but also the setting of its motive power in action or the manipulation of its controls so as to cause the particular vehicle to move." Manual for Courts-Martial, United States, 1984, Part IV, para. 35c(2) [hereinafter MCM, 1984].

[16] The Manual for Courts-Martial specifies that "[d]runken or reckless operation of water or air transportation may be alleged under other articles of the code, as appropriate." *Id.* Part IV, para. 35c(1).

[17] "'Drunk' and 'impaired' mean any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental or physical faculties. Whether the drunkenness or impairment was caused by liquor or drugs is immaterial." *Id.* Part IV, para. 35c(3).

[18] The Manual for Courts-Martial defines "reckless," when used in the context of article 111, as follows:

> The operation of a vehicle is "reckless" when it exhibits a culpable disregard of foreseeable consequences to others from the act or omission involved. Recklessness is not determined solely by reason of the happening of an injury, or the invasion of the rights of another, nor by proof alone of excessive speed or erratic operation, but all these factors may be admissible and relevant as bearing upon the ultimate question: whether, under all the circumstances, the accused's manner of operation of the vehicle was of that heedless nature which made it actually or imminently dangerous to the occupants, or to the rights or safely of others. It is driving with such a high degree of negligence that if death were caused, the accused would have committed involuntary manslaughter, at least. The condition of the surface on which the vehicle is operated, the time of day or night, the traffic, and the condition of the vehicle are often matters of importance in the proof of an offense charged under this article, and, where they are of importance, may properly be alleged.

Id. Part IV, para. 35c(4).

[19] The Manual for Courts-Martial explains that "'[w]anton' includes 'reckless,' but in describing the operation of a vehicle, it may, in a proper case, connote willfulness, or a disregard of probable consequences, and thus describe a more aggravated offense." *Id.* Part IV, para. 35c(5).

[20] *Id.* Part IV, para. 35b(1),(2).

[21] The element appears as follows: "That the accused thereby caused the vehicle to injure a person." *Id.* Part IV, para. 35b(3).

[22] The maximum punishment when personal injury results is a dishonorable discharge, forfeiture of all pay and allowances, and confinement for 18 months. *Id.* Part IV, para. 35e(1). When the misconduct involved no personal injury, the maximum punishment is a bad-conduct discharge, forfeiture of all pay and allowances, and confinement for six months. *Id.* Part IV, para 35e(2).

[23] The speed limit in the area of the accident was 100 kilometers per hour (kph), or approximately 62.15 miles per hour (mph). Expert testimony indicated that the accused was traveling between 112 and 130 kph (about 69.6 to 80.8 mph) when the accident occurred. *Lingenfelter*, 30 M.J. at 304.

[24] The evidence regarding how the other vehicle came to be in the path of the accused's vehicle was, according to the Court of Military Appeals, only conjectural. *Id.*

ally cut it in two, killing its sole occupant—the driver.[25] Based upon blood alcohol tests performed upon the accused after the accident, an expert estimated that the accused's blood alcohol content (BAC) at the time of the collision was between 1.8 and 2.0 milligrams of ethyl alcohol per milliliter (ml) of blood, which was well above the generally accepted cut-off level for intoxication.[26] Expert testimony also indicated that the accused did not decelerate prior to the accident.[27]

The government charged the accused with drunken and reckless driving and involuntary manslaughter.[28] The former charge alleged that the accused "operate[d] a vehicle, to wit: a passenger car, while drunk or impaired by alcohol, and in a reckless manner by driving at a speed in excess of the posted speed limit and did thereby cause said vehicle to strike and kill [the victim]."[29] The military judge found the accused guilty of violating article 111, after having excepted the words "and in a manner by driving" from the above-quoted specification. The judge acquitted the accused of the manslaughter charge.

The Court of Military Appeals in *Lingenfelter* first observed that the so-called "element" concerning personal injury actually is not an element of proof for drunk and reckless driving. It is instead an aggravating circumstance that, if pleaded and proved beyond a reasonable doubt,[30] will expose the accused to a greater maximum punishment.[31]

The court next noted that "mere excessive speed, absent recklessness or wantonness, is not a component of article 111."[32] The court observed that although "excessive speed can be highly probative of recklessness and wantonness ... the military judge here evidently did not find [the accused's] speed to have risen to the level of recklessness ... ."[33] Accordingly, the accused stood convicted only of drunken driving resulting in a fatal injury.[34]

The court finally addressed whether the accused's misconduct "thereby caused" the injuries to the victim within the meaning of the third "element" of article 111. The court rejected the government's argument that the accused's conduct in driving while intoxicated need only be a cause-in-fact of the injuries to expose the accused to the greater maximum punishment.[35] The court concluded instead that the accused's drunken driving must be the proximate cause of the victim's injuries. Quoting *United States v. Romero*,[36] the court in *Lingenfelter* adopted the following standard for determining if the accused "proximately caused" the fatal injuries to the victim for purposes of article 111: "To be proximate, an act need not be the sole cause of death, nor must it be the immediate cause— the latest in time and space preceding the death. But a contributing cause is deemed proximate only if it plays a material role in the victim's death."[37] As to whether the victim's purported negligence broke the chain of causation, the court explained that "the second act of negligence [must] loom[] so large in comparison with the first, that the first is not to be regarded as a substantial factor in the final result."[38]

Applying these standards to the facts in *Lingenfelter*, the court found that the evidence supported the military judge's finding that the accused's drunken driving proximately caused the death of the victim, even though the victim may have been negligent in putting his vehicle in the path of the accused. The court noted that the collision occurred on an apparently clear night in an area where the accused had an unobstructed view of the road before him. Moreover, the defense presented no evidence that suggested that the accused decelerated prior to the collision. Finally, the judge could have reasonably concluded that, even if the drivers could not have avoided the collision completely, the accused could have mitigated the victim's injuries if he had been sober and driving with due care.

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[25] *Id.* at 303.

[26] An expert testified that the accepted level for intoxication was at about 0.8 to 1.0 milligrams of ethyl alcohol per milliliter of blood. *Id.* at 303-04.

[27] *Id.* at 304.

[28] *See* UCMJ art. 119.

[29] *Lingenfelter*, 30 M.J. at 305.

[30] *Id.* at 306 n.3 (citing United States v. Beene, 15 C.M.R. 177, 182 (C.M.A. 1954)).

[31] *See supra* note 22.

[32] *Lingenfelter*, 30 M.J. at 305-06.

[33] *Id.* at 306 n.2.

[34] As the Manual for Courts-Martial recognizes:

> While the same course of conduct may constitute both drunken and reckless driving, ... article [111] proscribes these as separate offenses, and both offenses may be charged. However, as recklessness is a relative matter, evidence of all the surrounding circumstances which made the operation dangerous, whether alleged or not, may be admissible. Thus, on a charge of reckless driving, evidence of drunkenness might be admissible as establishing one aspect of the recklessness, and evidence that the vehicle exceeded a safe speed, at a relevant prior point and time, might be admissible as corroborating other evidence of the specific recklessness charged. Similarly, on a charge of drunken driving, relevant evidence of recklessness might have probative value as corroborating other proof of drunkenness.

MCM, 1984, Part IV, para. 35c(6).

[35] *Lingenfelter*, 30 M.J. at 306.

[36] 1 M.J. 227 (C.M.A. 1975).

[37] *Lingenfelter*, 30 M.J. at 307 (quoting *Romero*, 1 M.J. at 229).

[38] *Id.* (quoting United States v. Cook, 18 M.J. 152, 154 (C.M.A. 1984)).

In the second case, *United States v. Scranton*, the accused lost control of the vehicle he was driving, causing it to roll over four times.[39] The accident killed one of vehicle's passengers and injured four others. At the time of the accident the accused was speeding[40] and was intoxicated.[41]

The court-martial convicted the accused, *inter alia*, of four specifications of drunken driving resulting in injury, with one specification corresponding to each of the injured passengers.[42] The defense raised no multiplicity issue at trial—either for findings or sentencing purposes—with regard to the four specifications under article 111.[43] The issue faced by the Court of Military Appeals was whether Congress intended the court-martial to convict and punish the accused separately for four specifications of drunken driving causing injury, when all of the injuries arose out of a single incident.

The court in *Scranton* first looked to the statutory language of article 111 to determine congressional intent. The statute, however, makes no reference to physical injury or the number of victims.[44] The court next examined the legislative history of article 111, which likewise does not suggest that the drafters considered physical injury, rather than the act of drunken driving, to be the appropriate unit of prosecution under article 111.[45] The court also found that because the law traditionally has not recognized drunken driving as constituting separate offenses when the accused has injured multiple victims, it should apply the well-established "rule of lenity" to the accused's benefit. Accordingly, the *Scranton* court concluded that the court-martial could convict and punish the accused for only a single specification of drunken driving.[46]

In reaching this conclusion, the Court of Military Appeals acknowledged that the President has the authority to provide for increased punishment for drunken driving when personal injury results.[47] The court reiterated, however, that "Manual provisions do not determine the proper prosecutorial unit for a congressional statute."[48] Major Milhizer.

The Protection of Child Victims: *United States v. Thompson*

At an Air Force general court-martial, before a military judge alone, Sergeant John Thompson stood convicted of sodomizing and assaulting his stepsons, ages seven and ten, on numerous occasions over a period of approximately one year. Both children suffered permanent rectal injury as a result of the abuse.[49] The military judge sentenced Thompson to thirty years of confinement, total forfeitures, reduction to pay grade E-1, and a dishonorable discharge.

At the court-martial, the child victims did not face Thompson when they testified. Instead, in response to trial counsel's request, they testified from a chair in the center of the courtroom with their backs to Thompson. The military judge, trial counsel, and defense counsel could see the boys, and the boys could see them, as they testified.[50] The trial counsel supported his request with a psychologist's testimony. The psychologist stated that "[t]he boys entered these proceedings having stated a great deal of anxiety and shame and fear about participation .... I think that their being in the direct line of vision with the defendant will impair their ability to talk about their experiences and to actively think about the questions that they're responding to."[51] Defense counsel objected to the special arrangements for the boys claiming that the arrangements violated Thompson's sixth amendment right to confront witnesses against him.

The Court of Military Appeals held that the trial court's granting the trial counsel's request did not violate Thompson's sixth amendment confrontation rights.[52] The court primarily relied on the recent Supreme Court case of *Maryland v. Craig*.[53] In *Craig* the Supreme Court

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[39] *Scranton*, 30 M.J. at 323.

[40] The accused in *Scranton* was traveling about 72 mph in a 40 mph zone. *Id.*

[41] Scranton's BAC was 1.6 milligrams of ethyl alcohol per milliliter of blood. *Id.*

[42] The court-martial also convicted the accused of negligent homicide in violation of UCMJ article 134 for the passenger whom the accident killed. *Id.* at 322.

[43] *Id.* at 323.

[44] *See* UCMJ art. 111.

[45] *Scranton*, 30 M.J. at 324-25.

[46] Of course, the specification can reflect that the accused's misconduct injured four people. *See id.* at 327.

[47] *See generally* UCMJ art. 56.

[48] *Scranton*, 30 M.J. at 326 (citing United States v. Baker, 14 M.J. 361, 367 (C.M.A. 1983)).

[49] CM 26797, slip op. at 2 (C.M.A. 25 Sep. 1990).

[50] *Id.*

[51] *Id.* at 3.

[52] Judge Cox wrote the majority opinion. Chief Judge Everett wrote a concurring opinion.

[53] 110 S. Ct. 3157 (1990).

affirmed the defendant's conviction in the face of a sixth amendment confrontation challenge. The child victims in *Craig* testified by one-way closed circuit television outside the courtroom. The Supreme Court reiterated its preference for face-to-face confrontation but allowed other arrangements based on case-specific findings that each child likely would suffer emotional trauma, thereby impairing his or her ability to testify, if the court forced him or her to face the accused.[54] The Supreme Court discussed other ways that the court could protect the accused's confrontation rights. The Court noted:

> Because there is no dispute that the child witnesses in this case testified under oath, were subject to full cross-examination, and were able to be observed by the judge, jury, and defendant as they testified, we conclude that, to the extent that a proper finding of necessity has been made, the admission of such testimony would be consonant with the confrontation clause.[55]

In *Thompson* the Court of Military Appeals held that the procedure used provided the same "safeguards of reliability and adversariness" as provided by the procedure the court used in *Craig*. The children were under oath and understood the oath's significance; they were subject to cross-examination; and the military judge, as factfinder, could observe each child's demeanor and assess each child's credibility. In conclusion, the court stated that the most important factor was that the military judge and the Air Force Court of Military Review "specifically found that the procedure utilized to protect the children was *necessary*."[56]

The Court of Military Appeals appeared to follow closely the analysis and conclusions of the Supreme Court in *Craig* with possibly one exception. The Court of Military Appeals did not appear concerned with the accused's inability to observe the child witnesses' facial expressions and the fronts of their bodies. In *Thompson* the accused could observe only the childrens' backs. The Supreme Court consistently mentioned the importance of the *accused* and the factfinder observing the child victim testifying under oath subject to cross-examination. The Supreme Court in *Craig* noted:

> We find it significant, however, that Maryland's procedure preserves all of the other elements of the confrontation right: the child witness must be competent to testify and must testify under oath; the defendant retains full opportunity for contemporaneous cross-examination; and the judge, jury, and defendant are able to view (albeit by video monitor) the demeanor (and body) of the witness as he or she testifies.[57]

Perhaps the Court of Military Appeals assumed that defense counsel can protect the accused's rights if counsel can observe the witness's face and front, as occurred in *Thompson*. In *Craig*, however, although one defense counsel was in the room with the child witness, the other defense counsel stayed in the courtroom to observe the testimony with Craig, who could see the child's face. Significantly, the accused may be the only person in the courtroom who is capable of observing and understanding significant changes in the child's expressions and body language as he or she testifies. In *Craig* the accused could relate these observations and understandings to defense counsel for possible use during cross-examination.

The Court of Military Appeals left for another day the question of a potential due process violation if court members are present when the court makes special arrangements to protect a child witness. Would the accused appear to be such a "bad guy" that the panel members would infer guilt because the child could not bear to face the accused?[58] In his concurring opinion, Chief Judge Everett warned military judges that they "should be careful to preclude such an inference by giving appropriate instructions."[59] Major Merck.

Aiding and Abetting Larceny

Introduction

For over a decade, the military's appellate courts have struggled with the question of when a person actually completes a larceny offense.[60] How a court answers this question often will determine an actor's criminal culpability for joining in an ongoing or just completed theft.

United States v. Keen[61] is the latest military case to address this issue. The court's opinion in *Keen* is significant for several reasons. It analyzes when a larceny has terminated as a matter of law, it applies that law and the theory of aiding and abetting[62] to the facts of the case,

[54] *Id.* at 3170.

[55] *Id.*

[56] *Thompson*, slip op. at 8-9.

[57] *Craig*, 110 S. Ct. at 3166.

[58] *Thompson*, slip op. at n.6 (Everett, C.J., concurring).

[59] *Id.* at n.5 (Everett, C.J., concurring).

[60] UCMJ art. 121.

[61] 30 M.J. 1108 (N.M.C.M.R. 1990).

[62] *See* UCMJ art. 77; MCM, 1984, Part IV, para. 1b(2)(b).

and it addresses whether the law requires a plan or agreement between the accused and his coactors for the accused to be guilty. Before discussing the specific facts of *Keen*, a brief review of the pertinent law is appropriate.

Background

Black letter military law has long held that larceny under a wrongful taking theory[63] continues until the actor has completed asportation[64]—that is, the carrying away of the object of the larceny.[65] The Court of Military Appeals, in the 1979 case of *United States v. Escobar*,[66] concluded that the original asportation continues as long as the perpetrator is not satisfied with the location of the goods and causes the flow of their movement to continue in a relatively uninterrupted manner.[67] As the court explained later that year in *United States v. Seivers*,[68] a "larceny continues until such time as its fruits are secured in a place where they may be appropriated to the use of the perpetrator of the scheme."[69]

Because the crime of larceny continues throughout the asportation phase, anyone who knowingly assists in the actual movement of the stolen property during that phase may be guilty of larceny as a principal.[70] Whether a person who participates in an ongoing larceny is guilty of that offense depends, in part, upon his mens rea—that is, his purpose for participating in the conduct. A court may find a participating person guilty of larceny if his or her intent was "to secure the fruits of the crime."[71] If his or her motive instead was to assist the perpetrator in escaping detection and punishment, however, he or she would then not be guilty of larceny as a principal but may instead be guilty as an accessory after the fact.[72]

Once the asportation is complete, the actor has, likewise, completed the larceny.[73] For example, in *United States v. Henderson*,[74] the court determined that the "[l]arceny of field jackets and silverware was complete when the soldiers having custody over them moved them to another part of the premises [the central issue facility] with felonious intent, concealing them so that the [accused] could have ready and undetected access to them."[75] Accordingly, when the accused later obtained these items, his actions did not make him a principal to the larceny that another actor already had consummated.[76] An accused who obtains stolen property after another has completed the asportation may nonetheless be guilty of receiving stolen property.[77]

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[63] *See* MCM, 1984, Part IV, para. 46b(1)(a), c(1)(b). *See generally* United States v. Carter, 24 M.J. 280 (C.M.A. 1987) (wrongful taking requires dominion, control, and asportation). The drafters of article 121 intended to codify all forms of common law larceny and larceny by false pretenses. *See, e.g.*, United States v. Cummins, 26 C.M.R. 449 (C.M.A. 1958) (false promises to repay a loan), and conversion. *See generally* United States v. Mervine, 26 M.J. 482, 483 (C.M.A. 1988); United States v. Herndon, 36 C.M.R. 8 (C.M.A. 1965); Note, *Larceny of a Debt: United States v. Mervine Revisited*, The Army Lawyer, Dec. 1988, at 29. Included within the common law forms of larceny, in addition to larceny by wrongful taking, are larceny by wrongful obtaining and by wrongful withholding. MCM, 1984, Part IV, para. 46b(1); *see, e.g.*, United States v. Moreno, 23 M.J. 622 (A.F.C.M.R.), *petition denied*, 24 M.J. 348 (C.M.A. 1986) (larceny by wrongful withholding by writing checks against money erroneously deposited in accused's account).

[64] *See generally* Note, *Larceny and Proving Asportation*, The Army Lawyer, Feb. 1990, at 67.

[65] 4 Blackstone Commentaries 231; Black's Law Dictionary 147 (4th ed. rev. 1968).

[66] 7 M.J. 197 (C.M.A. 1979).

[67] *Id.* at 198-99. In *Escobar*, the accused hid the victim's leather jacket in some bushes while helping the victim move. Shortly thereafter, the accused retrieved the leather jacket and brought it back with him to the base. *Id.* at 197. The court concluded that the accused had not completed the asportation of the jacket—and thus the larceny had not terminated—until he removed the jacket from its place of temporary concealment in the bushes and took it back to his quarters. *Id.* at 199.

[68] 8 M.J. 63 (C.M.A. 1979).

[69] *Id.* at 65. In *Seivers*, the court found that the alleged larceny by fraud was not complete until the accused severed an insurer's possession of the proceeds of a claim filed by the accused by his taking actual possession of the proceeds. That occurred when the accused received the insurance draft at his on-post duty address, endorsed the draft, and then deposited it in his account. *Id.* at 65.

[70] *See* UCMJ art. 77; MCM, 1984, Part IV, para. 1.

[71] United States v. Manuel, 8 M.J. 822, 825 (A.F.C.M.R. 1979).

[72] *Id.* UCMJ article 78 provides:

> Any person subject to this chapter who, knowing that an offense punishable by this chapter has been committed, receives, comforts, or assists the offender in order to hinder or prevent his apprehension, trial, or punishment shall be punished as a court- martial may direct.

See MCM, 1984, Part IV, para. 3.

[73] *See* United States v. Chambers, 12 M.J. 443 (C.M.A. 1982).

[74] 9 M.J. 845 (A.C.M.R. 1980).

[75] *Id.* at 846. *Henderson* is difficult to reconcile with *Escobar*, in which the Court of Military Appeals found that the accused had not completed asportation when he temporarily hid the stolen jacket in some bushes. *See Escobar*, 7 M.J. at 197. One distinguishing factor between the cases is that the accused in *Escobar* clearly could not have been satisfied with the location of the stolen jacket while it lay concealed in the bushes because the item was exposed to the public and a passerby easily could have taken it. In *Henderson*, on the other hand, the accused stored the stolen items in a secured building (the CIF), where the accused likely felt satisfied that someone else would not take them. Of course, both *Henderson* and *Escobar* are close cases, and commentators may best explain their contrary results by accepting that different courts resolve close factual questions differently.

[76] *Henderson*, 9 M.J. at 846-47.

[77] *See* UCMJ art. 134; MCM, 1984, Part IV, para. 106. A recent case discussing this issue is United States v. Graves, 20 M.J. 344 (C.M.A. 1985).

The last reported case prior to *Keen* to address these issues was *United States v. Cannon*.[78] The court in *Cannon* determined[79] that the theft of a stereo that served as the basis for the charged larceny occurred sometime on 19 January.[80] At 0900 on that same date, the perpetrator of the larceny sought the accused's assistance in pawning the stereo to obtain money. Consequently, no more than nine hours could have passed between the initial taking and the accused's involvement. The court concluded on these facts that, "regardless of the precise amount of time between the actual theft and [the perpetrator's] appearance at [the accused's] door, it seems circumstantially reasonable to conclude that [the perpetrator] was 'dissatisfied with the location of the stolen goods' and that the asportation phase of this larceny was still ongoing."[81] The court found, therefore, that the military judge did not err in accepting the accused's pleas of guilty to larceny.

The Case of United States v. Keen

During the early morning hours on the day of the theft, three enlisted Marines visited the accused at his room.[82] During the course of their discussions, one of the Marines suggested that the group steal a stereo system belonging to a roommate. The accused, although believing that they were only joking, stated, "If we're going to do it we better do it right."[83] A few hours later, the sound of two of the Marines carrying stereo equipment into the accused's room awakened him. The Marines departed and returned a short time later carrying more equipment and a television. Shortly after the last trip,[84] the accused helped the Marines carry the equipment out of the barracks to a waiting car. The accused did not receive any compensation for his efforts in moving the equipment.

Applying the authority and principles discussed above, the court in *Keen* concluded that the accused was guilty of larceny of the equipment under an aiding and abetting theory. Specifically, the court found that the asportation phase of the larceny continued with the removal of the equipment from the accused's room to the car. The court wrote:

> [I]t is clear that [the accused's] room was only a way point in the removal (asportation) of the property. The thieves had to keep the property moving in order to dispose of it and to avoid predictable eventual detection. The further removal to the vehicle, and perhaps beyond, was nothing more or less than an integral part of the scheme, intended from the outset by the perpetrators. [The accused] joined in mid-scheme, so to speak, and thereby became involved in the larceny itself as an aider and abettor rather than as an accessory after the fact.[85]

The Impact of Keen

Several additional aspects of the *Keen* decision are worth noting. First, the court indicated that the asportation phase of the larceny may have continued beyond placing the property in the automobile.[86] Given the factual posture of the case, the court did not have to specify at what point the asportation ceased and thus the larceny was complete. It nonetheless seems clear that, had the accused first aided and abetted the other Marines in taking the equipment after they already had secured it in the car, he would be guilty of larceny if he and his coactors were not satisfied with the location of the equipment in the car and the accused helped cause the flow of its movement to continue in a relatively uninterrupted manner.[87] In other words, the distance and time taken to move the property is not determinative of when the asportation ends; rather, the continuity of, and motivation for, the movement defines the scope of the asportation.

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[78] 29 M.J. 549 (A.F.C.M.R. 1989).

[79] The court had to make several important factual determinations based upon what it characterized as "scant information concerning the initial theft, particularly the timing." *Id.* at 555.

[80] The providence inquiry apparently did not narrow the time of the initial theft of the stereo beyond 16 to 19 January. The stipulation of fact was more specific, establishing that the theft occurred some time on 19 January. *Id.* Because the stipulation of fact was not inconsistent with the providence inquiry on this matter, the court in *Cannon* held its contents could serve as a basis for establishing the facts of the case. The court also noted that the accused would "not be heard to contest, for the first time on appeal, the accuracy of a stipulation under these circumstances." *Id.* at 555 n.4.

[81] *Id.* at 555-56.

[82] *Keen*, 30 M.J. at 1109. The accused was a Private First Class (PFC), as were the three other Marines who visited him.

[83] *Id.*

[84] The court's opinion did not specify the total number of trips made to the accused's room, except that at least two trips occurred. *Id.*

[85] *Id.* at 1109-10.

[86] *Id.* at 1109 ("[t]he further removal to the vehicle, and perhaps beyond").

[87] *See Escobar*, 7 M.J. at 198-99.

Second, the court in *Keen* made clear that the law does not require proof that the accused received a financial gain or other compensation for the court to find him guilty of larceny. The court's conclusion correctly applied the elements of proof for larceny, which do not include a requirement for such consideration.[88] The court's conclusion likewise recognized that the mens rea prescribed for aiding and abetting larceny requires only that the accused share the criminal intent of the perpetrator to take the property wrongfully,[89] and not necessarily to profit from the misconduct.[90]

Finally, the court in *Keen* unambiguously held that the accused's guilt of larceny under an aiding and abetting theory does not turn on whether he prearranged his participation in the theft.[91] Prior decisions seemed to disagree on the need for prearranged participation or a plan. In *United States v. Greener*[92] the Navy Court of Military Review wrote that "[i]n order to be a principal, the aiding and abetting must either be before the fact or there must at least be an agreement or plan before the commission of the offense for the accused to perform certain acts afterwards in furtherance of the plan's objective."[93] Three years later, in *United States v. Bryant*,[94] the Army Court of Military Review concluded instead that "[i]t makes no difference whether the continuation of the asportation by one other than the actual taker was prearranged or the result of decisions made on the spur of the moment."[95] The court in *Keen* specifically rejected the analysis in *Greener* in favor of the Army court's analysis in *Bryant*.[96]

Conclusion

Keen provides valuable guidance regarding larceny under an aiding and abetting theory. Given the frequency of larceny allegations and the complexity of the issues involved, practitioners should become familiar with matters addressed by *Keen* and the other cases discussed above. Major Milhizer.

Court of Military Appeals Extends Fourth Amendment Restrictions to AAFES Employees

Two years ago, in *United States v. Quillen*,[97] the Court of Military Appeals ruled that article 31(b) applied to questioning of shoplifting suspects by Army-Air Force Exchange Service (AAFES) store detectives. The court reasoned that because military authorities control the post exchange, an AAFES store detective "in a very real and substantial sense act[s] as an instrument of the military."[98] Accordingly, the court determined that the employee's acts are "not private, but governmental in nature and military in purpose."[99] Although it recognized that article 31(b) generally did not apply to questioning by civilians, the Court of Military Appeals determined that the civilian status of an AAFES store detective was irrelevant in *Quillen* given the detective's role as "an instrument of the military." Therefore, the law required article 31(b) rights warnings before a court-martial could admit into evidence an accused's answers in response to questioning by the post exchange store detective.

Quillen clearly overruled earlier case law that likened AAFES employees to private security guards, whom article 31 and the fifth amendment do not bind when questioning suspected shoplifters.[100] The court, on the other hand, left unanswered whether the fourth amendment similarly binds the conduct of AAFES employees. The recent case of *United States v. Baker*,[101] however, resolves the issue—searches and seizures conducted by AAFES store personnel *do* trigger the fourth amendment's protections.

In *Baker*, an AAFES store detective[102] saw the accused twice try to put a stereo into a large brown box he had brought into the store. Although the accused was unsuccessful, the store detective suspected that the box might contain other AAFES merchandise. After Baker exited

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[88] *See* MCM, 1984, Part IV, para. 46b(1).

[89] Specifically, larceny requires the accused, under any theory of principals, to have an "intent permanently to deprive or defraud another person of the use and benefit of the property or permanently to appropriate the property for the use of the accused or for any person other than the owner." *Id.* Part IV, para. 46b(1)(d).

[90] *See id.* Part IV, para. 1b(2)(b)(ii).

[91] Note that headnote 6 in *Keen* incorrectly indicates the opposite—that "[t]here must be a plan or agreement before the taking in order for one who assists with asportation to be liable for larceny as a principle." *Keen*, 30 M.J. at 1108.

[92] 1 M.J. 1111 (N.C.M.R. 1977).

[93] *Id.* at 1112-13.

[94] 9 M.J 918 (A.C.M.R. 1980).

[95] *Id.* at 920.

[96] *Keen*, 30 M.J. at 1110 n.3.

[97] 27 M.J. 312 (C.M.A. 1988).

[98] *Id.*

[99] *Id.* at 314.

[100] United States v. Pansoy, 11 M.J. 811 (A.F.C.M.R. 1981); United States v. Jones, 11 M.J. 829 (A.F.C.M.R. 1981).

[101] 30 M.J. 262 (C.M.A. 1990).

[102] Coincidentally, the AAFES store detective in *Quillen* was the same one as in *Baker*; both cases occurred at AAFES facilities at Fort Lewis, Washington.

the store into the mall area, the AAFES employee approached him, and asked him to come with her back into the exchange. She subsequently searched the box and discovered $510 worth of stereo equipment belonging to AAFES.

In his opinion, with which Judge Sullivan concurred, Chief Judge Everett wrote that "the protection of the Fourth Amendment is not limited to searches and seizures by investigators or law-enforcement personnel. It also extends to searches and seizures performed by many other governmental officials."[103] He concluded—as the Court of Military Appeals did in *Quillen*—that because military authorities control AAFES, the store detective acts not as a private person, but as a government official. In sum, "a customer entering a post exchange or other government operated store has a privacy interest which entitles him to Fourth Amendment protection."[104]

Although the court held in *Baker* that the fourth amendment extends to searches and seizures by an AAFES employee, it concluded that, on the facts of the case, fourth amendment protections did not arise. The *Baker* court noted that, "[i]n our view, a person who brings a big box into a post exchange and opens it in a furtive or surreptitious manner has a reduced expectation of privacy in comparison with a customer who walks through the exchange with a sealed box or a closed purse."[105] Evidently, the court determined that Baker's own conduct reduced his fourth amendment protection, and made the store detective's search constitutionally reasonable. The Court of Military Appeals further noted that, because institutions and laws reflect the "reasonableness of expectations of privacy in a society,"[106] the court may use the numerous state laws permitting private store owners to search or detain shoplifters to evaluate the reasonableness of Baker's claimed privacy interest in the box. The court concluded that these laws evidence a societal judgment that store owners may protect themselves against shoplifters. Consequently, Baker could not reasonably expect to exit the post exchange "without having his box inspected when, as here, his actions gave reason to believe he was engaged in shoplifting."[107] Judge Cox, concurring only in the result, would not extend the fourth amendment to AAFES store detectives. He viewed AAFES not as an instrument of the military, but as an instrumentality of the United States. Furthermore, Judge Cox noted that AAFES store personnel do not function as agents of the military; rather, their duties are more akin to private store guards. Judge Cox, therefore, would not extend the protections of article 31(b) or the fourth amendment to their acts. With the Chief Judge's imminent departure, and an expanded court, the Court of Military Appeals possibly may alter its view of AAFES store detectives. Presently, however, *Quillen* and *Baker* set the constitutional standard. Major Borch.

Does Drug Distribution Require Physical Transfer?

In *United States v. Omick*[108] the Navy-Marine Corps Court of Military Review addressed the question of whether an accused can effect the distribution of a controlled substance under article 112a[109] if no physical transfer of the drug occurs. In discussing this issue, the court suggested a useful methodology for assessing congressional intent generally in the context of the UCMJ.

The accused in *Omick* pleaded guilty, *inter alia*, to wrongfully distributing cocaine in violation of article 112a.[110] During the providence inquiry, the accused explained that he agreed to provide cocaine to the buyer with the understanding that the accused would keep a portion of the drug for his personal use.[111] Unbeknownst to the accused, the buyer was an undercover law enforcement agent. Pursuant to an agreement, the accused met with the buyer in the latter's truck to complete the drug transaction. The accused directed the buyer's attention to some cocaine that the accused was holding in his hand. The buyer told the accused to "hold on to it until we get to [the buyer's] house," and paid the accused half of the agreed upon price. The buyer then stepped out of the truck and had the accused apprehended.

Article 112a proscribes, among other things, the wrongful distribution of cocaine. The statute does not,

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[103] *Baker*, 30 M.J. at 266-67 (citing Camara v. Municipal Court of the City and County of San Francisco, 387 U.S. 523 (1967) (building inspector); See v. City of Seattle, 387 U.S. 541 (1967) (fire department); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) (inspection under liquor laws); Marshall v. Barlow's, Inc., 436 U.S. 307 (1978) (Occupational Safety and Health Act inspections); Michigan v. Tyler, 436 U.S. 499 (1978) (inspection for cause of fire)).

[104] *Id.* at 268.

[105] *Id.*

[106] *Id.*

[107] *Id.* at 269.

[108] 30 M.J. 1122 (N.M.C.M.R. 1989).

[109] UCMJ art. 112a.

[110] *Omick*, 30 M.J. at 1123.

[111] *Id.* at 1124.

however, define expressly the term "distribute." The court in *Omick*, therefore, had to decide whether Congress intended wrongful distribution to encompass the misconduct of the accused—that is, a drug transaction that is partially complete but in which no physical transfer of the drug takes place.

The court wrote in *Omick* that "[a]bsent an explicit definition in the UCMJ, the next best source for determining what Congress means when it uses a word is to examine the same word in the United States Code."[112] The court noted that the federal civilian counterpart to article 112a[113] defines "distribute" as meaning "to deliver (other than by administering or dispensing) a controlled substance or a listed chemical"; and that the statute elsewhere defines "deliver" as meaning "the actual, constructive, or attempted transfer of a controlled substance or a listed chemical...."[114] Accordingly, the accused's attempted transfer of the cocaine in *Omick* would constitute a distribution within the plain meaning of the federal civilian drug statute.[115]

The court in *Omick* next observed that the 1984 Manual for Courts-Martial also defines the term "distribute." The Manual for Courts-Martial provides that "distribute," in the context of article 112a, "means to deliver to the possession of another."[116] This same subparagraph provides further that "'[d]eliver' means the actual, constructive, or attempted transfer of an item, whether or not there exists an agency relationship." Although the President explained in the analysis to that subparagraph that the definition of "distribute" derives from the above-quoted federal civilian statutory counterpart of article 112a,[117] the explanatory paragraph in the Manual for Courts-Martial nonetheless includes the additional language that the delivery must be "to the possession of another." As noted above, the federal civilian statutory definition of "distribution" does not share this apparent requirement that an actor actually must transfer possession.[118]

In addition to being inconsistent with the federal civilian law, the Manual for Courts-Martial's definition of "distribute" appears internally ambiguous. On the one hand, the definition seemingly requires that an actor actually must transfer possession to constitute a distribution.[119] On the other hand, the Manual for Courts-Martial apparently recognizes that distribution can occur when an actor makes an "attempted transfer" of a drug.

The court in *Omick* concluded, however, that it need not determine the meaning and effect of the language in the Manual for Courts-Martial referring to the "deliver[y] to the possession of another."[120] The court found that this phrase constituted substantive criminal law, and thus was beyond the President's authority under the UCMJ.[121] The court wrote that to "whatever extent this phrase attempts to impose additional meaning not intended by Congress, it must be ignored."[122] Accordingly, the court concluded that wrongful distribution under article 112a includes the attempted transfer of a controlled substance—at least under the circumstances presented in *Omick*.

Omick is only the latest in a series of recent cases to consider the effect of language in the Manual for Courts-Martial relating to the scope of offenses and defenses under military law.[123] For example, in *United States v. Harris*[124] the Court of Military Appeals concluded that resisting apprehension[125] does not include fleeing apprehension, despite language in the Manual for Courts-Martial to the contrary.[126] In *Ellis v. Jacob*[127] the Court

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[112] *Id.*

[113] 21 U.S.C. § 802(11) (1988).

[114] *Id.* § 802(8).

[115] *Accord* United States v. Oropeza, 564 F.2d 316 (9th Cir. 1977), *cert. denied*, 434 U.S. 1080 (1978); United States v. Tamargo, 672 F.2d 887 (11th Cir. 1982) *cited in Omick*, 30 M.J. at 1124.

[116] MCM, 1984, Part IV, para. 37c(3).

[117] *Id.* Part IV, para. 37c(3) analysis, app. 21, at A21-95 ("This subparagraph is based on 21 U.S.C. sec. 802(8) and (11). *See also* E. Devitt and C. Blackmar, 2 *Federal Jury Practice and Instructions*, sec. 58.03 (3d ed. 1977).").

[118] *See supra* notes 112-14 and accompanying text.

[119] Of course, military law recognizes that wrongful possession in violation of article 112a can be either "direct" or "constructive." MCM, 1984, Part IV, para. 37c(2). Accordingly, an actor may obtain possession, and thus have possession transferred to him, without an actual physical transfer taking place. *See generally* United States v. Traveller, 20 M.J. 35 (C.M.A. 1985).

[120] *Omick*, 30 M.J. at 1124.

[121] *See generally* UCMJ arts. 36, 56.

[122] *Id.*

[123] For an earlier discussion of the President's authority under the UCMJ with respect to substantive military law, see *United States v. Johnson*, 17 M.J. 252 (C.M.A. 1984), and *United States v. Margelony*, 33 C.M.R. 267 (C.M.A. 1963).

[124] 29 M.J. 169 (C.M.A. 1989).

[125] *See* UCMJ art. 95.

[126] MCM, 1984, Part IV, para. 19c(1)(c). *See generally* Note, *Fleeing Apprehension is Not Resisting Apprehension*, The Army Lawyer, Dec. 1989, at 35.

[127] 26 M.J. 90 (C.M.A. 1988).

of Military Appeals found that the President could not change substantive military law by language in the Manual for Courts-Martial[128] designed to eliminate the defense of partial mental responsibility.[129] In *United States v. Jackson*[130] the Court of Military Appeals expanded false official statement offenses under military law[131] to include false or misleading responses given during official questioning of the accused—even when the accused did not have an official duty to account[132]—despite language in the Manual for Courts-Martial requiring that duty.[133] Finally, in *United States v. Byrd*[134] Chief Judge Everett concluded that military law must recognize a defense of voluntary abandonment[135] to criminal attempts,[136] even though the Manual for Court-Martial's failure to recognize the defense could indicate an intent by the President to reject it.[137]

Merely because the President's authority does not extend to substantive criminal law does not mean, however, that the Manual for Courts-Martial is irrelevant when addressing those issues. In *United States v. Jeffress*,[138] for example, the Court of Military Appeals considered the scope of kidnapping[139] under the so-called "pure" article 134 theory.[140] In deciding whether incidental movement or detention is sufficient for kidnapping under this theory of prosecution, the court wrote "if the President, who is the Commander-in-Chief, concludes that certain conduct is not in itself service-discrediting or contrary to good order and discipline, we assume that Congress would be reluctant for that conduct to be prosecuted as a violation of the first two clauses of Article 134."[141]

The important implications of these decisions should be obvious. The definitions of crimes and defenses reflected in the Manual for Courts-Martial do not constitute the interpretive limits for military practitioners. Rather, military practitioners are free to litigate the underlying correctness of those definitions and explanations. This flexibility may benefit trial and government appellate counsel—as when the Court of Military Appeals expanded the scope of article 107 in *United States v. Jackson*[142]—or trial and appellate defense counsel—as in *United States v. Harris*,[143] when the Court of Military Appeals limited the scope of article 95 to exclude fleeing from apprehension.

One other matter is worth noting briefly. With few exceptions,[144] the government charges criminal attempts under military law as violations of article 80 of the UCMJ. If the government charges attempted distribution of a controlled substance under article 80, rather than article 112a, this presumed misdesignation almost certainly would not be prejudicial to the accused and, therefore, not entitle him to any meaningful relief.[145] Major Milhizer.

Legal Assistance Items

The Administrative and Civil Law Division, The Judge Advocate General's School, has prepared the following notes to advise legal assistance attorneys of current developments in the law and in legal assistance program policies. Legal Assistance attorneys also can adapt them for use as locally-published preventive law articles to alert soldiers and their families about legal problems and changes in the law. We welcome articles and notes for inclusion in this portion of *The Army Lawyer*. Authors should send their submissions to The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, VA 22903-1781.

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[128] *See* MCM, 1984, Rule for Courts-Martial 916(k)(2) [hereinafter R.C.M.].

[129] *Accord* United States v. Tarver, 29 M.J. 605 (A.C.M.R. 1989).

[130] 26 M.J. 377 (C.M.A. 1988).

[131] *See* UCMJ art. 107.

[132] *See generally* note, *The Court of Military Appeals Expands False Official Statement Under Article 107, UCMJ*, The Army Lawyer, Nov. 1988, at 38.

[133] MCM, 1984, Part IV, para. 31c(6)(a).

[134] 24 M.J. 286 (C.M.A. 1987).

[135] *See generally* note, *Voluntary Abandonment as a Defense to Attempts*, The Army Lawyer, Sep. 1990, at 32.

[136] *See* UCMJ art. 80.

[137] *Byrd*, 24 M.J. at 292 n.3.

[138] 28 M.J. 409 (C.M.A. 1989).

[139] *See* UCMJ art. 134.

[140] *See generally* note, *The Military's Anomalous Kidnapping Laws*, The Army Lawyer, Dec. 1988, at 32.

[141] *Jeffress*, 28 M.J. at 413.

[142] 26 M.J. 377 (C.M.A. 1988).

[143] 29 M.J. 169 (C.M.A. 1989).

[144] On exception is assault under an attempt theory. *See* UCMJ art. 128(a); MCM, 1984, Part IV, para. 54c(1)(b)(i); *e.g.*, United States v. Smith, 15 C.M.R. 41 (C.M.A. 1954); United States v. Crocker, 35 C.M.R. 725 (A.F.B.R. 1965).

[145] *See, e.g.*, United States v. Bluitt, 50 C.M.R. 675 (A.C.M.R. 1975) (misdesignation of assault with intent to commit rape under article 128 rather than article 134 was not prejudicial); *see also* R.C.M. 307(d).

Tax Note

Tax Aspects of the Reserve Call-up

The call-up of reservists to active duty during Operation Desert Shield raises several tax issues for the reservists and their civilian employers. The Internal Revenue Service (IRS) recently responded to a number of inquiries regarding the tax consequences for employers who continue to provide health coverage to reservists whom the Army called to active duty as part of Operation Desert Shield.[146]

Under COBRA (Consolidated Omnibus Reconciliation Act of 1985) rules, an employer providing health insurance benefits to employees must make continued coverage available to employees and their dependents who may lose coverage as a result of termination of employment or a reduction in work hours. Generally, an employer may end health care coverage when another group health plan covers the employee.[147]

The issue raised by many tax practitioners and health care providers is whether the military health care plan constitutes another group health plan that triggers a qualifying COBRA cutoff event. The IRS reasoned that since the federal government does not meet the code definition of employer, military plans are not group health care plans that trigger the COBRA cutoff rule. Thus, an employer cannot cut off health care coverage provided by plans subject to COBRA rules merely because a reservist receives health care coverage as an active duty member of the uniformed services and dependents receive coverage under the CHAMPUS program.

A "qualifying event" for COBRA purposes will occur if an employer does not voluntarily maintain coverage for the period contemplated in the code and the plan is otherwise subject to the requirements of the COBRA rules in section 4980B of the code.[148] The health care plan must offer the reservist and covered family members an election to continue coverage at their own expense. Reservists and dependents should receive a notice of their COBRA rights before an employer takes action to terminate benefits.

Tax practitioners agree that the reserve call-up should not affect reservists' pension plans dramatically. Employers must count time spent on active duty for purposes of participation, vesting, and benefit accrual if the reservist returns to the employer. Called-up reservists participating in defined contributory benefit plans also retain the right to make catch-up contributions to the plan when they return. Employers should not treat the call-up as a termination of employment for plan payouts.

The reserve call-up, however, may limit Individual Retirement Arrangement deductions for reservists who serve on active duty for longer than ninety days. The IRS considers individuals on active duty for over ninety days during the tax year as active participants in an employer-provided retirement plan.[149] Taxpayers who are active participants in employer-provided retirement plans lose the ability to make deductible IRA contributions if their adjusted gross income (AGI) exceeds $50,000 and they file a joint return or if their AGI exceeds $35,000 and they file a single return.[150]

Employers offering profit sharing plans do not need to make or match contributions to these plans on the reservist's behalf for the period of active duty. The employer, however, should make plan contributions for the part of the year that the reservist was an employee on the job.

The reserve call-up also raises questions concerning reservists' continued eligibility for benefits such as tuition assistance benefits, dependent-care, and stock option plans. According to at least one commentator, the IRS is unlikely to object to continued eligibility for these benefits.[151] MAJ Ingold.

Professional Responsibility Note

Ethics Rule Barring Unauthorized Practice of Law Withstands Constitutional Attack

A nonincorporated association of lawyers, paralegals, and laypersons challenged provisions of the American Bar Association (ABA) Model Code of Professional Responsibility (Model Code) that prohibit lawyers from forming partnerships with nonlawyers if any activities of the partnership constitute the unauthorized practice of law.[152] The ABA Model Code contains three provisions

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[146] *See* Internal Revenue Service Notice 90-58 (1990).

[147] I.R.C. § 4980B (West Supp. 1990).

[148] *Id.*

[149] Internal Revenue Service Notice 87-16, 1987-1 C.B. 446; 1987-5 I.R.B. 40 (1987).

[150] *See* I.R.C. § 219(g) (West Supp. 1990). The ability to make a deductible contribution phases out for joint filers having an AGI between $40,000 and $50,000. The phaseout range for single filers is $25,000 to $35,000 and the phaseout range for married filing a separate return is $0 to $10,000. *Id.*

[151] *See* Kiplinger Tax Letter, Vol. 65, No. 19 (Sept. 14, 1990).

[152] Lawline v. American Bar Assoc., 738 F. Supp. 288 (N.D. Ill. 1990).

that restrict the unauthorized practice of law.[153] In a suit filed against a number of private and governmental defendants, the association contended that promulgation, adoption, and enforcement of these prohibitions violated the Sherman Antitrust Act and the equal protection, due process, freedom of association, and free speech clauses of the United States Constitution.

The Federal District Court for the Northern District of Illinois rejected all of the plaintiff's claims. The court ruled that the Sherman Antitrust Act's four-year statute of limitations barred the antitrust allegations against the private association defendants. The court also dismissed the antitrust actions against the governmental defendants because the United States, and its agencies and instrumentalities, are not persons within the meaning of the Sherman Act.

The court determined that a distinction between lawyers and nonlawyers does not implicate a suspect class or a fundamental right. Accordingly, it held that the Model Code provisions were entitled to a presumption of constitutionality and "need only be rationally related to a legitimate state interest to survive equal protection or due process analysis."[154] The court concluded that disciplinary rules preventing lawyers from aiding nonlawyers in the unauthorized practice of law are rationally related to the legitimate governmental purpose of safeguarding the integrity of the profession.

The plaintiff's first amendment challenge to the Model Code prohibitions suffered a similar fate. The court relied on a line of precedent that held that neither the first nor the sixth amendments grant plaintiffs the right to have an unlicensed layman represent them in court proceedings.[155]

The American Bar Association Model Rules of Professional Conduct and the Army Rules of Professional Conduct for Lawyers (Army Rules) contain substantially similar prohibitions against the unauthorized practice of law. Rule 5.4(b) of the Army Rules states that "[a] lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law."[156] Similarly, under Rule 5.5 of the Army Rules, "[a] lawyer shall not ... assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law."[157]

Although the prohibition against participating in the unauthorized practice of law has long-standing roots, a debate over what constitutes the practice of law has persisted. According to the leading ABA ethical opinion on the subject, a lawyer can employ a nonlawyer to do any task "except counsel clients about law matters, engage directly in the practice of law, appear in court or appear in formal proceedings as part of the judicial process ..."[158] A subsequent opinion permits laypersons to conduct initial interviews with clients if the layperson does not provide legal advice and the client later confers with an attorney.[159]

Several states have issued guidelines specifying the types of tasks a lawyer may delegate to nonlawyers.[160] Generally, the guidelines permit nonlawyers to attend client conferences, draft legal documents for subsequent legal review, and conduct research. Even if a state has not issued guidance, courts consistently have determined that the phrase "unauthorized practice of law" is sufficiently clear to withstand constitutional scrutiny.[161]

Careful supervision of nonlawyer assistants is the key to proper delegation. Army attorneys delegating work to lay persons should take guidance from ABA ethics opinions and state definitions of the practice of law to the extent they are not inconsistent with the Rules of Professional Conduct for Lawyers and the guidance issued by The Judge Advocate General. MAJ Ingold.

Family Law Notes

Enforcing Child Custody Orders Against DOD Members, Employees, and Their Accompanying Family Members Located Overseas

Being stationed overseas no longer offers "protection" from child kidnapping charges or contempt proceedings arising out of the unlawful removal of a child from a state court's jurisdiction or from the custodial parent or guardian.

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[153] *See* Model Code of Professional Responsibility Canon 3 (1980) ("[a] lawyer should assist in preventing the unauthorized practice of law"); *id.* DR 3-101(A) ("[a] lawyer shall not aid a nonlawyer in the unauthorized practice of law"); *id.* DR 3-103 ("[a] lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law").

[154] *Lawline*, 738 F. Supp. at 295.

[155] *Id.* at 296, (citing Turner v. American Bar Assoc., 407 F. Supp. 451 (N.D. Tex. 1975) and Lindstrom v. State of Illinois, 632 F. Supp. 1535 (N.D. Ill. 1986), *dismissed without opinion*, 828 F.2d 21 (7th Cir. 1987)).

[156] Dep't of Army, Pam. 27-26, Rules of Professional Conduct for Lawyers, rule 5.4 (Dec. 1987) [hereinafter Army Rules].

[157] *Id.* rule 5.5(b).

[158] ABA Comm. on Professional Ethics, Formal Opinion 316 (1967). Note that the committee decided this opinion under the old Canons of Professional Ethics.

[159] ABA Comm. on Professional Ethics, Informal Opinion 998 (1967).

[160] *See, e.g.*, West Virginia State Bar Opinion 76-7 (1976); Rhode Island Supreme Court Guidelines for Use of Nonlegal Assistants, Provisional Order No. 18 (Feb. 1, 1983). Georgia, Illinois, Michigan, New Hampshire, New Mexico, and New York also have adopted guidelines for lawyers using legal assistants.

[161] Hackin v. Arizona, 102 Ariz. 218, 427 P.2d 910 (1967), *appeal dismissed*, 389 U.S. 143 (1968); Wright v. Lane County Dist. Court, 647 F.2d 940 (9th Cir. 1981).

Department of Defense Directive 5525.9 (DOD Dir. 5525.9) requires the Army to cooperate with courts and federal, state, and local officials in enforcing certain court orders.[162] These orders include:

> orders relating to DoD members and employees stationed outside the United States, as well as their family members who accompany them, who have been charged with, or convicted of, a felony[163] in a court, have been held in contempt by a court for failure to obey the court's order, or have been ordered to show cause why they should not be held in contempt for failing to obey the court's order.[164]

When a command receives a request for assistance from a court of competent jurisdiction, the command first must attempt to resolve the situation to the satisfaction of the court concerned. Further action taken by the command depends on the status of the subject of the request.[165]

Before the command takes any additional action against the subject of a court's request for assistance, however, the subject must "be afforded the opportunity to provide evidence of legal efforts to resist the court order or otherwise show legitimate cause for non-compliance."[166] When these legal efforts or legitimate causes warrant, the Secretary of the Army can authorize a delay of further action against the subject of the request for up to ninety days.[167] After that, the command must take additional action against the subject of a request involving a felony or the contemptuous or unlawful removal of a child from a custodial parent or guardian or from a court's jurisdiction. Non-action in those instances is authorized only when the Assistant Secretary of Defense (Force Management and Personnel) grants an exception.[168]

Missouri Court Applies Mansell

The Eastern District of the Missouri Court of Appeals has held that the Supreme Court's decision in *Mansell v. Mansell*[169] precludes a state court from including amounts deducted from an ex-soldier's retirement pay for income taxes, and as a result of the "dual compensation rule,"[170] as divisible marital property.[171]

In *Moon v. Moon*[172] the court awarded a woman 41.7% of her ex-husband's military retired pay. At the time she filed the action, his gross retirement pay was $1607. As a result of deductions for income taxes, and because the ex-husband was subject to the dual compensation rule applicable to retired soldiers working for the United States government, she was receiving only $515 per month. She maintained that the parties' intention in reaching a property division was that her payment would be based on her ex-husband's gross retired pay. A trial court agreed and entered judgment for the ex-wife in the amount of $670.12 per month (41% of $1607).

In reversing the trial court, the Court of Appeals held that the *Mansell* decision bound it to allow the division of only disposable retired pay as marital property. The court further found that section 1408 of the Uniform Services Former Spouses' Protection Act explicitly excluded the amounts deducted from the retired soldier's retired pay from the definition of disposable retired pay.[173] CPT Connor.

Soldiers' and Sailors' Civil Relief Act Note

A Look at the Credit Industry's Approach to the Six Percent Limit on Interest Rates

Introduction

In the weeks since President Bush ordered the activation of thousands of reserve component service members,

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[162] *See* 32 C.F.R. part 146 (1989).

[163] *See id.* § 146.3. DOD Dir. 5525.9 defines a felony as "[a] criminal offense that is punishable by incarceration for more than 1 year, regardless of the sentence that is imposed for commission of that offense." *See id.*

[164] *Id.* § 146.4.

[165] The commander must order a soldier subject to the request to return to an appropriate port of entry at government expense. A supervisor must strongly encourage a DOD employee who is the subject of the request to comply with the court order. Failure to respond can serve as the basis for termination of command sponsorship and for removal from federal service. The commander must strongly encourage a family member who is the subject of the request to comply with the court order. Subsequent failure to comply may be the basis for withdrawing command sponsorship. *See id.* § 146(b)-(d).

[166] *Id.* § 146.6(a).

[167] 55 Fed Reg. 34555 (Aug. 23, 1990) (to be codified at 32 C.F.R. § 146.6(a)); *see also* Message, HQ, Dep't of Army, 241930Z Jul 89, subject: Implementation of DODD 5525.9, Compliance of DOD Members, Employees, and Family Members Outside the United States with Court Orders.

[168] 32 C.F.R. § 146.6(a)(1).

[169] 109 S. Ct. 2023 (1989).

[170] 5 U.S.C. § 5532 (1988).

[171] *See* Moon v. Moon, 16 Fam L. Rep. (BNA) 1475 (Mo. Ct. App. July 17, 1990)

[172] *Id.*

[173] 10 U.S.C. § 1408(a)(4)(B), (C).

the six percent limitation on interest rates in section 526 of title 50, United State Code Appendix,[174] has continued to generate controversy. The first-time application of this law to a computerized credit industry has resulted in numerous unanticipated problems for creditors and debtors alike. While the congressional intent that lenders cannot accrue the difference between six percent and the contractually agreed interest rate during active service is well established,[175] not all lenders are complying with this limitation. Attempts to circumvent the limitation are not uncommon. Even for the lenders who attempt to comply with this provision of the Soldiers' and Sailors' Civil Relief Act (SSCRA), the complications involved can be daunting. This note will discuss and analyze these issues and related questions that have arisen as attorneys apply the SSCRA during Operation Desert Shield. When appropriate, the article will offer proposed responses and solutions to some of these problems.

Waiver of Interest Above Six Percent

Responding to a multitude of inquiries about the SSCRA generated by reserve call-ups during Operation Desert Shield, the House and Senate Veterans' Affairs Committees held a joint hearing on the SSCRA on September 12, 1990. In prepared testimony submitted to the committees, members of the mortgage banking industry acknowledged that lenders should forgive interest above six percent if a service member otherwise qualifies for such protection.[176] Representatives of the Mortgage Bankers Association of America,[177] the Federal National Mortgage Association (Fannie Mae),[178] the Federal Home Loan Mortgage Corporation (Freddie Mac),[179] and the Government National Mortgage Association (Ginnie Mae)[180] all agreed that mortgages issued by lenders backed by their organizations would not accrue interest above six percent during active service of qualifying individuals.

As a general rule, these organization require that mortgage issuers obtain a copy of a reserve component service member's orders to active duty before granting the reduction in interest. Fannie Mae has taken a more lenient policy than required by the SSCRA. It has indicated that it will not require the mortgage issuer or servicer to determine whether entry on active duty materially affects a service member's ability to pay interest at the contractually agreed rate. Upon receipt of orders, Fannie Mae automatically will reduce interest payments to six percent.

Although it does not affect service members directly, the issue of who pays or absorbs the difference between six percent and the original interest rate can be important. Depending on where the loss falls, service members can expect willing compliance with the SSCRA or, alternatively, delay and unnecessary administrative requirements.

According to the testimony before Congress, mortgage pools hold two-thirds to three-fourths of mortgage loans issued in the recent past.[181] Under a mortgage pool arrangement, the lender holds a security issued by Fannie Mae, Freddie Mac, or Ginnie Mae. Freddie Mac and Fannie Mae purchase loans and issue securities backed by these loans. They are the owners of record of the mortgages they back. Freddie Mac and Fannie Mae have informed mortgage issuers backed by their organizations that Freddie Mac and Fannie Mae will absorb losses caused by implementation of the six percent rule. Consequently, service members with these types of mortgages should experience minimal problems in persuading their mortgage issuers to lower interest rates.

On the other hand, Ginnie Mae does not consider itself to be the owner of record for the securities it guarantees. Rather, VA and FHA loans merely back these securities. Ginnie Mae expects the particular mortgage bank that services each loan to continue payments on the securities and to absorb the losses caused by the six percent limit. Accordingly, these banks may prove to be reluctant to comply with this provision of the SSCRA.

Similarly, if a mortgage pool does not hold a loan, the commercial bank or lender issuing the loan will absorb

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[174] 50 U.S.C. App. § 526 (1982).

[175] *See* Note, *Soldiers' and Sailors' Civil Relief Act Protection for Active and Reserve Component Soldiers*, The Army Lawyer, Oct. 1990, at 49.

[176] Under 50 U.S.C. App. § 526, the service member must have entered the loan agreement prior to active service. The creditor has the burden of establishing that military service does *not* affect materially the ability to pay.

[177] *The Soldiers' and Sailors' Civil Relief Act: Joint Hearing before the House and Senate Veterans' Affairs Committees*, 101st Cong., 2d Sess. (1990) (statement of Lyle E. Gramley, Senior Staff Vice President and Chief Economist, Mortgage Bankers Association). The Mortgage Bankers Association deals exclusively with real estate loans. It represents mortgage banking companies, commercial banks, mutual savings banks, savings and loan associations, mortgage insurance companies, life insurance companies, mortgage brokers, title companies, state housing agencies, investment bankers, and real estate investment trusts.

[178] *Id.* (statement of Robert J. Engelstad, Senior Vice President, Federal National Mortgage Association).

[179] *Id.* (statement of Judith A. Kennedy, Vice President, Government Affairs, Federal Home Loan Mortgage Corporation).

[180] *Id.* (statement of Arthur J. Hill, President, Government National Mortgage Association).

[181] *Id.* (statement of Lyle E. Gramley, Senior Staff Vice President and Chief Economist, Mortgage Bankers Association of America).

the loss. The testimony before Congress indicated that up to two-thirds of all mortgages are not in mortgages pools.[182] Again service members may have difficulty in dealing with mortgage issuers under these circumstances. Actually, some lenders are agreeing to interest reductions to six percent during active service, but are insisting on accruing the difference and adding it to the life of the loan. For the reasons discussed above and in the October 1990 issue of *The Army Lawyer*, this position is erroneous and contrary to law.

Current Creditor Ploys to Avoid the Six Percent Limitation

Mortgage companies and other creditors that choose not to comply with the SSCRA have done so in various ways, some of which are subtle but effective.[183] Two well-known finance companies, one specializing in personal loans and the other in automobile purchase loans, interpret the SSCRA as forgiving interest above six percent. The companies insist, however, on increasing payments on principal to the point that total monthly payments under their revised plans are equal to payments before application of the SSCRA protection. Although this may result in early repayment of the loan, it provides no current relief from payments that may be unmanageable on a military salary. This approach defeats the congressional purpose behind enactment of this provision and is a violation of the SSCRA.

Another approach some of the finance companies take is to agree ostensibly to reduce the interest charges to six percent by refinancing the loan at a six percent rate. The companies then charge the service member new finance charges associated with loan initiation. Another variation is refinancing at the six percent rate, but requiring payments based on the number of years remaining on the mortgage, rather than the number of years agreed upon in the original financing arrangement. This approach results in higher payments at the six percent rate than a service member would pay if the lender were to base the new mortgage on the original term of years.

In both of these scenarios, service members stand to lose some, if not all, of the benefits of the six percent limitation. They are paying more than the appropriate amounts, based on the additional charges or higher monthly payments. Further, they could lose entirely the protection of the six percent interest cap. Unscrupulous creditors may argue this provision becomes inapplicable upon refinancing. These creditors would base their argument on the service member's signing the new loan agreement for refinancing *after* entry on active duty, while the six percent protection applies only to financing arranged prior to entry on active duty.

The response to this tactic is two-fold. First, in the language of section 526 of the SSCRA, Congress included as interest subject to the six percent cap charges such as "service charges, renewal fees, fees or any other charges (except bona fide insurance) in respect of [the loan]."[184] This language is sufficiently broad and prohibitory to preclude so-called "refinancing" fees and charges. Second, congressional debate prior to enactment of the provision anticipated attempts to affect the underlying obligations in these situations. One member of Congress noted that the intent of this provision was to avoid affecting the "substance of the contract," and to address only a contract's enforcement.[185] Obviously, a finance company's attempt to refinance entirely a loan would affect the substance of the contract and contravene congressional intent. Accordingly, service members should refuse to apply for refinancing and insist that the lender reduce interest charges to six percent with no provision for accrual. The burden of persuasion rests with the creditor, who, under the SSCRA, must convince a court otherwise.

Some creditors are refusing to reduce interest to six percent until a service member submits proof of premobilization income compared to current military income. Section 526 puts the burden on the creditor to establish that military service is *not* affecting the ability to repay a loan or a mortgage. As a practical matter, however, service members best can take advantage of the SSCRA by putting the creditor on notice of their desire to benefit from this provision. A service member should furnish to a creditor a reasonable amount of proof of material effect.

Unfortunately, some creditors are more aggressive in their demands for proof of material effect. Some require current lists of debts and assets as well as completion of new loan applications. These requirements are contrary to the SSCRA. As discussed previously, Congress did not intend the invocation of section 526 to affect the underlying contract. Submission of information regarding debts, assets, and new loan applications indicates a creditor's intent to reappraise the creditworthiness of a customer. The lender, however, should have completed this evalua-

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[182] *Id.*

[183] Lieutenant Commander Laura M. Horton, USNR, Office of the Staff Judge Advocate, National Naval Medical Center, Bethesda, Maryland, provided information concerning creditor ploys and proposed responses.

[184] 50 U.S.C. § 526 (1982).

[185] 88 Cong. Rec. 5366 (1942).

tion when the individual initially applied for the loan. The SSCRA places the burden on the creditor to establish no material effect from active service. Submission of proof of a significant reduction in salary while on active duty should be sufficient, and, as noted, is more than the SSCRA actually requires of a service member.

Adverse Credit Reports

Some creditors may submit adverse credit reports on service members who assert rights under the SSCRA. Attorneys should advise a service member who suspects this has happened to contact the credit reporting agencies in that service member's hometown. Under the Fair Credit Reporting Act (FCRA),[186] credit reporting agencies must release the nature and substance of information in their files. The FCRA further requires these agencies to investigate any disputed information. If the investigation does not resolve the dispute, a service member, or any other consumer, has the right to submit a statement explaining the error. The credit reporting agency must include this statement with future credit reports and furnish it to certain persons who have requested the credit report in the past.

Credit Cards

Even for creditors who correctly apply section 526, compliance is sometimes technically difficult. The SSCRA particularly challenges credit card issuers in their efforts to accord the benefits of the six percent interest limitation to service members. The following example illustrates the difficulties involved with open-end financing through credit cards.

Assume a reserve component service member has a common credit card, such as a Mastercard or a Visa card, and has agreed to pay 14.9 percent interest on any balance not paid within one month of billing. If the service member has a balance owed of $500 prior to active duty, the service member may invoke section 526 when military service affects his or her ability to pay. In this event, the card issuer must reduce interest charges on the $500 to six percent. Any additional charges after entry on active duty, however, will be subject to the original 14.9 percent interest rate. Section 526 applies only to preservice financial obligations. The card issuer must now determine a method by which to track two interest rates for one charge card. Given current computerized banking technology, this has proven to be unfeasible. Instead, many banks now are issuing service members second cards, which the service member must use to make transactions occurring after he or she enters on active duty. While this appears to be a reasonable solution, it undoubtedly will generate confusion among service members. Attorneys should anticipate questions arising from these situations and be prepared to provide competent and informed advice.

Conclusion

The premise underlying the SSCRA is that prior obligations should not disadvantage service members either legally or financially when serving their country.[187] The six percent limitation on interest rates represents one effort by Congress to protect the financial well-being of service members. Legal assistance attorneys should be proactive in educating and assisting their clients in asserting their rights under this provision. The first months of the reserve call-up represent the most critical time for effective use of this provision. The responsibility of legal assistance attorneys is to ensure that their clients do not waive or diminish their rights inadvertently under the SSCRA because a creditor is unfamiliar with the law or because of creditor malfeasance. Accomplishing this goal requires sound knowledge of the SSCRA and effective advocacy in dealing with clients' creditors. MAJ Pottorff.

Contract Law Note

Enhancing Competition Through the Use of the Electronic Bulletin Board (EBB)

Various commands within the Department of Defense (DoD) recently have put into operation "Electronic Bulletin Board" (EBB) systems. The EBBs provide ready access to consolidated information about these commands' contracting requirements. The systems significantly promote full and open competition. For example, the Navy Supply Center in Charleston, South Carolina; the United States Air Force Space Command at Peterson Air Force Base, Colorado; and the United States Communications Command at Scott Air Force Base, Illinois, have launched "user-friendly" computer access programs that will enhance competition measurably through the efficient distribution of valuable, up-to-date information. These programs also provide a means by which users can receive answers to specific questions. Although EBB information is unofficial, users will be able to keep abreast of current and future contracting opportunities. Ready access to this information undoubtedly will encourage competition for the award of government contracts.

Gaining access to an EBB is simple. After submitting a proper application, businesses receive individual access

[186] 15 U.S.C. § 1681 (1988).

[187] *See* 50 U.S.C. App. § 510 (1982).

codes and instructional materials. With the proper modem, and upon access to a specific program, users can obtain general information about contracting matters or, by following specific menus, they can focus their inquiries. For example, the Air Force Communications Command (AFCC) offers a "Files Menu"[188] that includes information on topics such as future requirements, *Commerce Business Daily* synopses, draft requests for proposals, and existing contracts. The AFCC's field procurement activities furnish most of the information presented in the "Files Menu."

The AFCC system also includes a "Message Menu" feature through which users can ask questions about information contained in the "Files Menu." The AFCC displays the answers to these questions for all users so that everyone may benefit from the information.[189] The command, however, does not reveal the identity of the users that posed the questions.

The Navy Supply Center has taken the EBB concept a step further. The Navy system, "Electronic Bid/Bulletin Board" (EB3), not only provides contractors with the opportunity to review existing and future requirements and to ask questions about the requirements, but also gives them a chance to submit their quotes via EB3. The Navy downloads the quotes into an ASCII file each morning and then prints them, stamps them with date and time, and seals them. The EB3 system operators then hand-carry the quotes to the buyer.

The time may come when the EB3 system, or some derivative of the EB3 system, will include all non-emergency procurements. Currently, however, neither the 1989 amendments to the Federal Acquisition Regulation (FAR) authorizing the use of facsimile bids and proposals,[190] nor the clauses that authorize telegraphic bids or proposals,[191] permit the use of computer-transmitted bids and proposals. The government could remedy this obstacle by amending the FAR to include computer-transmitted bids and proposals.[192]

Electronic Bulletin Board systems offer significant opportunities for promoting full and open competition. Ready access to current procurement information by potential contractors—regardless of their geographic locations—will enhance competition, ultimately to the benefit of all concerned. Additionally, as users become more familiar with these systems, their feedback will enable system operators to improve service, making them even more valuable tools.

The keys to the complete success of EBB systems are increased availability and user awareness. The principal procurement centers should develop systems that they have tailored to their particular needs and that they have based on the experiences of other systems currently in use. Then, as additional systems come on-line, the procuring activities should spare no effort to encourage use by as many potential contractors as possible. In sum, the EBB concept is solid, and its potential is virtually unlimited. All that remains to be done is to implement the new capability effectively. LTC Monroe and MAJ Cameron.

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[188] The AFCC has entitled its system "Helpful Information For Industry" or "HIFI."

[189] The public broadcast approach is also consistent with maintaining a fair and level playing field.

[190] *See* FAR 14.201-6(w), 15.407(j). FAR 52.214-31(a) and 52.215-18(a) define "facsimile bid" and "facsimile proposal," respectively, as a bid or proposal "that is transmitted to and received by the Government via electronic equipment that communicates and reproduces both printed and handwritten material."

[191] Telegraphic bid or proposal includes mailgrams. *See* FAR 52.214-13, 52.215-17.

[192] The amendment would be identical to the amendment for "facsimile" bid or proposals, except for the requirement of communicating and reproducing "handwritten material." The amendment also would include a provision that bidders or offerors promptly must sign and submit complete copies of their bids or proposals to confirm their computer-transmitted bid or proposal.

Claims Report

United States Army Claims Service

Claims Policy Notes

Reconsideration of Action in Federal Tort Claims Act Claim

This Claims Policy Note limits the action that claims personnel can take under the provisions of paragraphs 4-14a and b of AR 27-20, to conform with the procedures required by the Attorney General's Regulations for reconsiderations under the Federal Tort Claims Act. In accordance with paragraph 1-9f, AR 27-20, this guidance is binding on all Army claims personnel.

The following actions can be taken by an original approval or settlement authority:

a. *Reconsideration.* An original approval or settlement authority may reconsider the denial of, or final offer, in a claim under the Federal Tort Claims Act upon request of the claimant or someone acting in his or her behalf.

b. *Settlement Correction.* An original approval or settlement authority may reopen and correct his or her action on a claim that was previously settled in whole or

in part (even where a settlement agreement has been executed) when an error contrary to the mutual understanding of the parties is discovered in the original action (e.g., a claim is settled for $15,000 but the settlement agreement is typed to read $1,500 and is not discovered until the file is being prepared for payment). If appropriate, a corrected payment will be made. The approval or settlement authority will reopen his or her action on a claim when he or she has reason to believe that a settlement was obtained by means of fraud by the claimant (or his or her representative) and, if substantiated, will correct his or her action. The basis for any correction of an action will be stated in a memorandum which will be included in the file.

The following actions can be taken by a successor approval or settlement authority:

a. *Reconsideration.* A successor approval or settlement authority may reconsider the denial of or final offer in a claim under the Federal Tort Claims Act upon request of the claimant or someone acting in his or her behalf only on the basis of fraud, substantial new evidence, errors in calculation or mistake (misinterpretation) of law.

b. *Settlement Correction.* A successor approval or settlement authority may reopen and correct a predecessor's action on a claim which was previously settled in whole or in part for the same reasons as an original authority, as stated above.

These rules will be incorporated into AR 27-20 at some future date. COL Lane.

Depreciation on Vinyl Car Roofs

This Claims Policy Note provides additional guidance to paragraph 2-40a, DA Pamphlet 27-162. In accordance with paragraph 1-9f, AR 27-20, this guidance is binding on all Army claims personnel.

In the past, USARCS has suggested depreciating vinyl car roofs at a rate of twenty percent per year. Because vinyl roofs manufactured in the 1960s and 1970s had a tendency to peel and fade quickly, vinyl car roofs were considered with automobile convertible tops (Allowance List—Depreciation Guide, Item No. 7).

Advances in technology and materials have improved significantly the quality and durability of vinyl car roofs. Accordingly, vinyl car roofs on vehicles manufactured after 1980 should be depreciated at a rate of ten percent per year, with a maximum depreciation of seventy-five percent—the rate applied to automobile paint jobs (Allowance List—Depreciation Guide, Item No. 8). Mr. Frezza and CPT Ward.

Nontemporary Storage Offset Actions

This Claims Policy Note updates paragraph 11-37b, AR 27-20; paragraph 3-26d, DA Pamphlet 27-162; and figures 3-10 and 3-11, DA Pamphlet 27-162. In accordance with paragraph 1-9f, AR 27-20, this guidance is binding on all Army claims personnel.

The Military Traffic Management Command (MTMC) has revised procedures for processing offsets against nontemporary storage (NTS) contractors.

Previously, claims offices forwarded impassed NTS demands to either Eastern Area or Western Area MTMC for offset, pursuant to paragraph 11-37*b*, AR 27-20, and to paragraph 3-26*d*, DA Pam 27-162. Effective immediately, claims offices instead will forward impassed NTS files to the Regional Storage Management Office (RSMO) responsible for administering the Basic Ordering Agreements for storage in that geographic area. The geographic areas for the four RSMO's appear shown in figure 3-10, DA Pam 27-162 (p. 71).

The Atlanta RSMO has responsibility for NTS storage facilities in Alabama, Georgia, Florida, Mississippi, Tennessee, South Carolina, North Carolina, and Kentucky. The mailing address for the Atlana RSMO is: Chief, Atlanta RSMO (MTEA-PPS-A), Ft. Gillem, Bldg 712, Forest Park, GA 30050-5000.

The Bayonne RSMO has responsibility for facilities in Virginia, Maryland, Delaware, District of Columbia, New Jersey, New York, Connecticut, Rhode Island, Massachusetts, Maine, New Hampshire, Vermont, Pennsylvania, Ohio, Indiana, Illinois, Michigan, Minnesota, Iowa, West Virginia, and Wisconsin. The mailing address for the Bayonne RSMO is: Chief, Bayonne RSMO (MTEA-PPS-B), MTMCEA, Bldg 82 — Room 181, Bayonne, NJ 07002-5301.

The Oakland RSMO has responsibility for facilities in Hawaii, California, Oregon, Washington, Idaho, Nevada, Utah, Arizona, and New Mexico. The mailing address for the Oakland RSMO is: Chief, Oakland RSMO, MTMCWA, Oakland Army Base (MTWA-PPS-O), Oakland, CA 94626-5000.

The Topeka RSMO has responsibility for facilities in Alaska, Montana, Wyoming, Colorado, Texas, South Dakota, North Dakota, Nebraska, Kansas, Oklahoma, Missouri, Arkansas, and Louisiana. The mailing address for the Topeka RSMO is: Chief, Topeka RSMO (MTWA-PPS-T), P.O. Box 19225, Topeka, Kansas 66619-0225.

Claims personnel should update the addresses in figure 3-11, DA Pam 27-162 (p. 72), to reflect these changes. Claims offices also should note on figure 3-10 that the Oakland RSMO has responsibility for NTS facilities located in Hawaii, and the Topeka RSMO has

responsibility for NTS facilities located in Alaska. In addition, claims personnel should change the claims accounting classification referenced in paragraph 4 of figure 3-11 to reflect the current fiscal year accounting classification on October 1st each year.

These revised procedures will expedite recovery from NTS contractors. Ms. Shollenberger.

Personnel Claims Note

Receiving and Transferring Personnel Claims

In a few recent instances, claims offices have failed to log in claims when received and then have tried to transfer these claims to other offices without obtaining permission from USARCS in accordance with paragraph 11-9*c*, AR 27-20, and paragraph 2-55*j*, DA Pam 27-162. In one instance, a person in a claims office received a claim from the claimant, returned it, received it a second time, and then mailed it to another office—improperly—without ever logging the claim in. In another instance, claims personnel failed to date-stamp the claim on receipt.

The drafters designed paragraph 11-7, AR 27-20, and paragraph 2-12*b*, DA Pamphlet 27-162, to ensure that claims offices will *not* return personnel claims lacking documents to claimants, but instead will accept them and immediately log them in. Claims office personnel should advise claimants of this policy in writing and give claimants who submit claims lacking documents a time limit to submit additional information. If claimants do not make substantial efforts to comply, at the end of this time period, claims offices should adjudicate their claims and either pay them to the extent they are substantiated or deny them. Returning claims received only complicates statute of limitations investigations and encourages congressional inquiries. Claims personnel must date-stamp *all* claims upon receipt, regardless of their condition.

Paragraph 11-9*c*, AR 27-20, and paragraph 2-55*j*, DA Pamphlet 27-162, expressly prohibit transferring personnel claims to other claims offices without permission from USARCS or a command claims service. The fact that a personnel claim "occurred" in another office's area of responsibility is not, in itself, a basis for transferring that claim. As a rule of thumb, the Claims Service will not approve a transfer of a personnel claim unless another claims office is better situated to investigate and settle that claim. This policy limiting transfer of personnel claims is designed to speed up settlement of claims and preclude offices from "dumping" work on other offices.

Years ago, a number of offices engaged in practices such as these in efforts to "improve" processing time, making it impossible in some instances for USARCS to determine when the government actually received a claim. The claims system cannot tolerate this in the future. Processing times are a service-oriented goal; if they become an obsession, the whole system suffers and loses its professionalism. The Claims Service strongly encourages claims judge advocates to emphasize proper procedures for logging and transferring personnel claims and to report violations to the Personnel Claims Branch, AV 923-3229/4240, so that the Claims Service can effect corrective action. Mr. Frezza.

Affirmative Claims Note

Mail Merging with the Revised Affirmative Claims Management Program

One of the most important features of the new Affirmative Claims Management Program is "mail merging," which appendix E of the revised program documentation explains. Using the mail merge option, affirmative claims personnel can insert information from a claims record into a form letter "template" at the touch of a button, greatly reducing the time needed to generate letters to attorneys, hospitals, insurers, and tortfeasors. The Claims Service specifically designed the revised program to facilitate mail merging because a large number of offices asked USARCS to include this feature.

Some of the variables these templates use, such as "mofficer," "mrank," and "mmil-title" (for the recovery judge advocate's signature block), come from the program environment rather than from a particular claim record; if the user does not set up the program environment correctly, the templates will not print out properly.

Personnel should use the twelve USARCS-created templates that come as part of the program without modifications. Because each new program version will overwrite these USARCS templates, claims offices should create new templates to suit their needs rather than change any of the USARCS-created templates. Appendix F of the revised program documentation explains how to create your own template.

Creating a series of additional mail merge templates is not difficult. After reviewing appendix F, each office should use a word processing program such as ENABLE to put its own office form letters into template format. Note that a user *cannot* create or revise a template using the Affirmative Claims Management Program; rather, the user must leave the program, edit the template using a word processing program, and save the template in ASCII format.

The first template, of course, is always the hardest to create. A template will not run if a typing error exists in the name of the variable that the user instructs the program to use, or if the user has not entered the necessary names and addresses into the claim record. Remember that each paragraph or separate line must start

with a two-character code and end with a carat ("^")—even a blank line is entered as "bl ^" (see figure F-2 in the documentation). The section on "Troubleshooting Templates" (pp. 71-74 of the documentation) explains the most common problems.

No template exists for a questionnaire to an injured party or a follow-up to that questionnaire because the Claims Service does not envision offices opening claims records until they obtain sufficient information to make an assertion.

The Claims Service intended the mail merge feature to be an integral part of an office's affirmative claims program, and the "tickler" system built into the Affirmative Claims Management Program automatically records generation of a mail merge letter as a "last action" in determining whether the office has taken action within 30, 90, or 180 days. The Claims Service cautions recovery judge advocates that mail merging will save time, but only for offices that take the trouble to create and use templates. Mr. Frezza.

Management Note

Designation of Area Claims Office and Claims Processing Office

Pursuant to the authority contained in paragraph 1-7*b*(4), AR 27-20, Fort Wainwright was designated as an Area Claims Office (retaining office code 432) and Fort Richardson was designated as a claims processing office with payment authority (retaining office code 431). COL Lane.

Environmental Law Notes

OTJAG Environmental Law Division and TJAGSA Administrative and Civil Law Division

The following notes inform attorneys in the field of current developments in the areas of environmental law and changes in the Army's environmental policies. The OTJAG Environmental Law Division and TJAGSA Administrative and Civil Law Division encourage articles and notes from the field for this portion of *The Army Lawyer*. Authors should send submissions to The Judge Advocate General's School, ATTN: JAGS-ADA, Charlottesville, VA 22903-1781.

Regulatory Note

Amendment of Categorical Exclusion A-14[1]

Army Regulation 200-2 normally requires an environmental impact statement (EIS) whenever a significant biophysical impact results from the stationing or realigning of a CONUS brigade-sized unit or larger unit during peacetime.[2]

Rather than focusing on numerical or percentage triggers, the Army has amended Categorical Exclusion A-14, AR 200-2, (CX A-14) to concentrate on the environmental impacts of base realignments or force reductions. The amended CX A-14 retains the requirement for an environmental assessment (EA) or EIS for a base realignment or force reduction when the force realignment or reduction: 1) exceeds a statutory trigger; 2) results in the disruption of environmental, surety, or sanitation services; or 3) otherwise requires an EA or EIS.[3]

Federal Facilities Compliance Agreements

The goal of the Department of the Army is to be always in full compliance with all environmental laws. This goal is difficult to attain given the complex nature of environmental requirements and the fiscal and personnel limitations imposed on installation commanders. If non-compliance occurs, however, the commander must take prompt action to bring his facility into compliance.

Generally, installation commanders work cooperatively with the appropriate federal and state regulatory officials to achieve compliance. A negotiated compliance agreement normally formalizes this process. Consent and compliance orders, while similar to compliance agreements, are somewhat different. When

[1] *See* Note *Proposed Amendment of Categorical Exclusion A-14*, The Army Lawyer, Oct. 1990, at 66.

[2] Army Reg. 200-2, Environmental Effects of Army Actions, para. 6-3f (23 Dec. 1988).

[3] 55 Fed. Reg. 35904 (1990) (to be codified at 32 C.F.R. part 651).

Congress has waived sovereign immunity,[4] states[5] have the authority[6] to issue unilateral, enforceable orders against the Army.[7]

A Federal Facilities Compliance Agreement (FFCA) is an enforceable promise by the Army to the Environmental Protection Agency[8] or to a state to meet the standards and schedule contained in the agreement. The Army has used FFCAs for many years. Moreover, if non-compliance occurs, Army regulations now require an FFCA.[9]

Negotiation of an FFCA is primarily an installation responsibility.[10] Army Regulation 200-1 includes specific instructions on how to negotiate and conclude an FFCA.[11] The installation must consider the availability of funds to execute the requirements of the FFCA during the negotiation process and immediately thereafter.[12]

Practitioners must take special care not to violate the Anti-Deficiency Act.[13] To avoid Anti-Deficiency Act violations, all FFCAs must include a condition that the installation will take required actions subject to the availability of appropriated funds.[14] While a "subject to availability of appropriated funds" clause gives an installation a legal "out" if funding is not available, making every effort to obtain adequate funding is imperative.

Army Regulation 200-1 requires the Assistant Chief of Engineers to ensure compliance with the A-106/1383[15] process.[16] The installation commander[17] and facility engineer,[18] however, are responsible for the accurate and timely submittal of an installation's Form 1383.[19] By listing FFCA-required items as category one priorities on the Form 1383, commanders can maximize their installation's chances of receiving the funding necessary.

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[4] *See, e.g.*, 42 U.S.C. § 6992e (1988) (waiver of sovereign immunity in Medical Waste Tracking Act).

[5] The Environmental Protection Agency (EPA) has no authority to issue unilateral compliance orders against the Army or other federal agencies. The Department of Justice (DOJ) steadfastly has required that executive agencies resolve their legal disputes internally through the use of Executive Order 12146. This policy has become known as DOJ's "unitary executive doctrine," which holds that:

> the president has the ultimate duty to ensure that federal facilities comply with the environmental laws as part of his constitutional responsibilities under Article II, even though Executive branch agencies are subject to EPA's regulatory oversight. Accordingly, Executive Branch agencies may not sue one another, nor may one agency be ordered to comply with an administrative order *without the prior opportunity to contest the order within the executive Branch.* (emphasis in original).

Environmental Compliance by Federal Agencies: Hearings Before the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce, 100th Cong., 1st Sess., 210 (1987) (statement of F. Henry Habicht III, Assistant Attorney General, Lands and Natural Resource Division).

[6] Whether a state chooses to enter into an agreement or issue an order is often a function of the installation's relationship with the state regulators and also the state's statutory scheme.

[7] If an installation fails to abide by the terms of either an order or agreement, various enforcement options are available to the state. These enforcement mechanisms include withdrawing or revoking applicable air, water, or hazardous waste permits; seeking judicial remedies; or attempting to assess and collect fines or penalties. As a general matter, the Army has not agreed to pay state-assessed fines or penalties for violations of state environmental requirements. *See Regulatory Law Office Note*, The Army Lawyer, Sep. 1986, at 41. Not all courts agree, however, that the various federal environmental statutes have waived sovereign immunity for state-imposed fines and penalties. *See* Ohio v. United States Dep't of Energy, 904 F.2d 1058 (6th Cir. 1990) (Resource Conservation and Recovery Act and Clean Water Act waivers subject federal agencies to fines imposed under state law); Ohio v. Air Force, 17 Envtl. L. Rep. (Envtl. L. Inst.) 2120 (S.D. Ohio Mar. 31, 1987) (trial court ruled that Air Force must pay state administrative penalties for violations of Ohio clean air rules).

[8] The Environmental Protection Agency (EPA) cannot enforce directly the FFCAs it has entered into with other federal agencies because of the "unitary executive doctrine." *See supra* note 5. In those instances, however, a "citizen suit," filed by a state or an individual, typically can enforce the FFCA. *See* 42 U.S.C. § 6972 (1988) (RCRA citizen suit provision).

[9] Army Reg. 200-1, Environmental Protection and Enhancement, para. 6-3 (23 Apr. 1990) (hereinafter AR 200-1).

[10] *See id.* para 6-3. The Environmental Law Division will provide assistance during FFCA negotiations and will coordinate the approval and signature process.

[11] *Id.* para 12-6.

[12] *Id.* para. 6-3a.

[13] 31 U.S.C. § 1341 (1988).

[14] If possible, Army practitioners should negotiate a provision that subjects compliance to the availability of funding that Congress authorizes specifically for the project required by the FFCA. Alternatively, they should negotiate a provision that subjects compliance to the availability of funding that Congress authorizes for the project coupled with a commitment to request those funds. As a last recourse, practitioners should negotiate a provision that subjects compliance to the availability of funding allocated to the installation that the commander can use, consistent with fiscal law constraints, for the project.

[15] The Office of Management and Budget Circular No. A-106 outlines a process used by federal agencies to identify environmental funding requirements. The Army equivalent to the A-106 report is the Form 1383, "Environmental Pollution Prevention, Control and Abatement at DOD Facilities Report." These reports are management tools—not budget documents—and while they help identify environmental problems, they do not ensure funding to fix the problems.

[16] AR 200-1, para. 1-14g(5).

[17] *Id.* para. 1-25a(3).

[18] *Id.* para. 1-26a(2)(c).

[19] *See supra* note 15.

Finally, installations must forward draft FFCAs to the Environmental Law Division for review prior to their execution.[20] When forwarded, installations must ensure that the following information accompanies the agreement:

1. A description of the parties to the agreement; the problems the agreement is supposed to address; and what actions the installation will undertake pursuant to the agreement.
2. A map delineating the location of each site addressed by the agreement.
3. A proposed funding plan that ensures the installation can meet the compliance schedule.[21]

[20] AR 200-1, para. 6-3a(4).

[21] *Id.* para. 12-6d.

Case Note

Aberdeen Convictions Upheld

The Fourth Circuit has upheld the convictions of three civilian engineers employed at Aberdeen Proving Ground for violations of the Resource Conservation and Recovery Act (RCRA).[22] The court held that sovereign immunity does not protect individual government employees from prosecution under RCRA. It also held that, as part of the prosecution, the government did not have to prove the existence of regulations that defined the chemical wastes involved in the case as RCRA hazardous wastes.

[22] United States v. Dee, No. 89-5606 (4th Cir. Sept. 4, 1990) (LEXIS Genfed Library, Crrnt file).

Criminal Law Note

Criminal Law Division, OTJAG

Supreme Court—1989 Term, Part VI

Colonel Francis A. Gilligan
Lieutenant Colonel Stephen D. Smith

One Supreme Court theme over the past few years has been its emphasis on establishing minimum protections under the fourth, fifth, and sixth amendments, thereby leaving to the states the prerogative under their constitutions to grant greater rights to their citizens. This emphasis represents a majoritarian view[1] of the right to privacy, the right to counsel, the right against self-incrimination, and the right of cross-examination and confrontation. Rather than using the fourth, fifth, and sixth amendments as a means of controlling governmental action,[2] the Court seems to allow the police to take reasonable action, when necessary, to preserve public order.[3] The Court specifically has indicated in the past that when the special needs of law enforcement outweigh the individual's right to privacy, law enforcement needs are paramount.

This year the Court has indicated expressly that it will set forth the minimum constitutional standards but will not dictate other alternatives or procedural rules as a matter of federal constitutional law. In *Idaho v. Wright*[4] Justice O'Connor stated that, "'[a]lthough the procedural guidelines propounded by the court below may well enhance the reliability of out-of-court statements of children regarding sexual abuse, we decline to read into the Confrontation Clause a preconceived and artificial litmus test for the procedural propriety of professional interviews in which children make hearsay statements against a defendant.'"[5] In addition, in *Maryland v. Craig*[6] Justice O'Connor indicated that the Court would not require, as a matter of constitutional law, that the trial court observe children's behavior in the defendant's presence or

[1] *See generally* J. Ely, Democracy and Distrust (1980).

[2] Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 353 (1974).

[3] Griffin v. Wisconsin, 107 S. Ct. 3164 (1987).

[4] 47 Crim. L. Rep. (BNA) 2250 (U.S. June 27, 1990).

[5] *Id.* at 2253.

[6] 47 Crim. L. Rep. (BNA) 2258 (U.S. June 27, 1990).

explore less restrictive alternatives.[7] "[W]e decline to establish, as a matter of federal constitutional law, any such categorical evidentiary prerequisites for the use of the one-way television procedure."[8]

Again, in *Michigan Department of State Police v. Sitz*[9] the majority indicated that it would not dictate a choice between reasonable alternatives because that choice should remain with governmental officials "who have a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers."[10] Justice Brennan, however, rejected this majoritarian approach, stating:

> Indeed, I would hazard a guess that today's opinion will be received favorably by a majority of our society, who would willingly suffer the minimal intrusion of a sobriety checkpoint stop in order to prevent drunken driving. But consensus that a particular law enforcement technique serves a laudable purpose has never been the touchstone of constitutional analysis.... In the face of the 'momentary evil' of drunken driving, the Court today abdicates its role as a protector of that fundamental right.[11]

Other examples of the Court's deliberating the majoritarian approach to constitutional issues, this term and last term, are too numerous to mention.

Plain View

In *Horton v. California*[12] Justice Stevens wrote for a seven-justice majority, holding that evidence secured during a warrantless, plain view seizure is admissible even though its discovery was not inadvertent. The Court specifically rejected the inadvertence requirement contained in the four-justice plurality opinion of *Coolidge v. New Hampshire*.[13] The decision noted that using an objective standard to determine the propriety of a seizure is better than a subjective standard dependent on the officer's state of mind.[14] The Court also rejected the suggestion that the inadvertence requirement is necessary to prevent converting specific warrants into general warrants. Strict adherence to the requirements of probable cause and specificity serve to protect the interest of privacy and to limit the area and duration of a search.

Justice Brennan, dissenting in *Horton*, urged that the majority opinion would weaken the constitutionally protected possessory interest in property, and would encourage general exploratory searches and pretextual searches. He indicated that he took some comfort in believing that the majority would not necessarily hold evidence to be admissible when a pretextual search warrant existed. For instance, he noted the hypothetical case of an officer who has evidence of an individual having committed two crimes, but who has probable cause to believe that he will find only evidence of crime A in the place where the officer wants to search. If he or she, in actuality, hoped to find evidence of crime B—rather than crime A—in that place, the majority opinion would not make evidence of crime B admissible. In other words, Justice Brennan recognized that the *Horton* majority's opinion stopped short of permitting an officer to use a warrant to obtain evidence of crime A as a pretext to obtain evidence of crime B. Justice Brennan indicated, however, that police officers would apply warrant exceptions when they know evidence of crime A is available, and hope to obtain evidence of crime B.

Justice Stevens, on the other hand, disagreed with Justice Brennan's dissent in *Horton*. Justice Stevens pointed out that a police officer would list all the items he seeks to seize in the warrant application because the failure to do so could result in a court's suppressing unlisted evidence. He went on to cite the rule that, when the search warrant authorizes a seizure of evidence of crime A and the searching party finds that evidence, the search must cease. Justice Stevens noted that because an officer would have no reason to believe that he or she will find evidence of crime B before finding evidence of crime A, the officer would not take the risk of having to discontinue the search based on that rule.

Justice Brennan disagreed with Justice Steven's reasoning, stating that an officer, to save time, merely could list hard to find items in the warrant application, knowing that he or she will see other items in plain view. Arguing that rejection of the inadvertence requirement would lead to misuses by police officers, Justice Brennan encouraged the forty-six states that have the inadvertence requirement to maintain it under their state constitutions.

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[7] *Id.* at 2260.

[8] *Id.* at 2264.

[9] 47 Crim. L. Rep. (BNA) 2155 (U.S. June 14, 1990).

[10] *Id.* at 2157.

[11] *Id.* at 2158-59.

[12] 47 Crim. L. Rep. (BNA) 2135 (U.S. June 4, 1990).

[13] 403 U.S. 443 (1971).

[14] *Horton*, 47 Crim. L. Rep. (BNA) at 2140.

The inadvertence requirement, however, is not an element of plain view seizures under the federal constitution.

The majority opinion in *Horton* is instructive in its review of the fourth amendment. First, it emphasized that the fourth amendment prohibits warrantless searches and seizures unless they fall within a few specifically established and well-delineated exceptions. Secondly, it explained the various circumstances that may lead to application of the plain view doctrine. Finally, the *Horton* majority opinion discussed the difference between plain view—that is, an observation and seizure of property after a lawful intrusion into a protected area—and open view, which is the observation of property from an unprotected area.

Horton does not change Military Rule of Evidence 316(d)(4)(C), because the analysis of that rule indicates that the drafters based the inadvertence requirement upon dictum.[15] The rule does require probable cause to seize the evidence, whereas the language in *Horton* indicates a seizure is appropriate when the evidence's incriminating character is "immediately apparent."[16] The *Horton* language, however, is ambiguous in that it does not indicate explicitly whether law enforcement personnel need more or less than probable cause to believe the subject evidence would aid in a criminal prosecution. Nevertheless, the military at least has the advantage of a known standard for the probable cause requirement.[17]

Miranda and Undercover Officers

In *Illinois v. Perkins*[18] an eight-justice majority opinion held that *Miranda* does not apply when an undercover law enforcement officer is questioning an incarcerated suspect. Although *Miranda* would apply in the coercive atmosphere of a custodial interrogation, the Court noted that this coercive atmosphere is not present under all circumstances because, "'when the agent carries neither badge nor gun and wears not "police blue," but the same prison gray' as the suspect, there is no '*interplay* between police interrogation and police custody.'"[19] The opinion acknowledged that just because a suspect is in custody does not mean that police officers would not attempt undercover questioning. The Court cited its prior cases in which authorities used deception to obtain voluntary statements. One of these cases involved the questioning of Jimmy Hoffa by Partin, who was acting as an undercover agent.[20] The only difference between *Perkins* and *Hoffa*, however, was that Hoffa was not incarcerated. The Court also cited with apparent approval a case in which an officer told a suspect that police had found the suspect's fingerprints at the scene of the crime.[21]

Justice Brennan, dissenting in *Perkins*, indicated that the case involved only the question *Miranda*'s application. He further noted, citing *Edwards v. Arizona*[22] and *Michigan v. Mosley*,[23] that "[n]othing in the Court's opinion suggests that, had respondent previously invoked his Fifth Amendment right to counsel or right to silence, his statements would be admissible. If respondent had invoked either right, the inquiry would focus on whether he subsequently waived that particular right."[24]

Perkins is not very dramatic to military practice because, although it applies to the military, it does not conflict with the military's practice concerning article 31 warnings. The military courts have held that article 31 does not require undercover agents and informants to give such warnings.[25]

Standard for Stop

In *Alabama v. White*[26] a six-judge majority held that the corroboration of an anonymous tip provided reasonable suspicion to stop and question a suspect. At three o'clock on the afternoon of April 22, 1988, the police received an anonymous telephone call stating that Vanessa White would be leaving 235-C Lyndwood Terrace Apartments at a particular time; that she would be driving

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[15] Manual for Courts-Martial, United States, 1984, Military Rule of Evidence 316(d)(4)(C) analysis at A22-29 [hereinafter Mil. R. Evid.].

[16] *Horton*, 47 Crim. L. Rep. (BNA) at 2139.

[17] Mil. R. Evid. 316(d)(4)(C).

[18] 47 Crim. L. Rep. (BNA) 2131 (U.S. June 4, 1990).

[19] *Id.* at 2132 (citing Kamisar, Brewer v. Williams, Massiah, and Miranda: *What is "Interrogation"? When Does it Matter?*, 67 Geo. L.J. 1, 67, 63 (1978)) (emphasis in original).

[20] Hoffa v. United States, 385 U.S. 293 (1966).

[21] *Perkins*, 47 Crim. L. Rep. (BNA) at 2132.

[22] 451 U.S. 477 (1981).

[23] 423 U.S. 96 (1975).

[24] *Perkins*, 47 Crim. L. Rep. (BNA) at 2133 n.*.

[25] United States v. Kirby, 8 M.J. 8 (C.M.A. 1979); United States v. Flowers, 13 M.J. 571 (A.C.M.R. 1982).

[26] 47 Crim. L. Rep. (BNA) 2148 (U.S. June 11, 1990).

a brown Plymouth station wagon with its right tail light broken; that she would be going to Dobey's Motel; and that she would be in possession of a brown attache case containing cocaine. The police set up surveillance and observed a brown Plymouth station wagon with a broken tail light parked in front of building 235 of Lyndwood Terrace Apartments. The officers observed the respondent leave the building carrying nothing in her hands and enter the station wagon. They followed her on the most direct route to Dobey's Motel. When the vehicle turned onto the highway where the motel was located, the police stopped the vehicle just short of the motel. The police officer asked Vanessa White to step to the rear of her car, where an officer informed her they had stopped her because they suspected her of carrying cocaine in the vehicle. The police asked if they could look for cocaine, and the respondent gave them permission to search the car. The officers found a locked brown attache case in the car and, upon request, Ms. White provided the combination to the case's lock. When the police officers opened the attache case, they found marijuana inside. The officers then placed Ms. White under arrest, and incidentally searched her purse to discover three milligrams of cocaine.

Justice White, who wrote the opinion in *Illinois v. Gates*,[27] recognized that an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity. Law enforcement personnel need something more than merely an anonymous tip to establish reasonable suspicion for a stop. In *Gates*, of course, police had something more than just a tip. In *White*, however, "[t]he tip was not as detailed, and the corroboration was not as complete, as in *Gates*, but the required degree of suspicion was likewise not as high."[28]

Although *White* was a "close case",[29] the Court held that the police effectively had corroborated four separate facts from the tip: 1) a women left the building identified by the caller; 2) she left in the vehicle described by the informant; 3) she apparently left at the time alleged in the tip; and 4) evidently she was enroute to the destination predicted by the caller. Accordingly, the Court found that the corroboration was sufficient to give the police reasonable suspicion to make the stop.

The *White* Court recognized that differences exist between tips that describe the future actions of third parties and tips that relate information concerning easily obtained facts. The Court considered the caller's description of the building and car in *White* as examples of easily obtained facts, while it considered the woman's movement on a particular route, and to a particular destination, as future actions that were privy only to an individual who knew of a third party's itinerary.

The dissent in *White* indicated that the majority's opinion "makes a mockery" of fourth amendment protection.[30] The dissent claimed that the ruling easily could allow a person to be the target of a prank or grudge because he or she has a routine concerning travel to and from work, child care centers, meetings, and other commitments. The dissenting opinion further criticized the lack of information concerning whether the respondent worked on an evening shift, whether she was a room clerk or operator at the motel, and whether the officer made any attempt to ascertain the informer's identity. The dissent suggested that the tipster very well could have been another police officer with a hunch.

Third Party Consent

In *Illinois v. Rodriguez*[31] the Court, in a six-justice majority opinion held that "a warrantless entry is valid when based upon the consent of a third party whom the police, at the time of the entry, reasonably believe to possess common authority over the premises, but who in fact does not do so."[32] On July 26, 1985, the police received a call to the residence of Dorothy Jackson. At her residence they met her daughter, Gay Fisher, who showed signs of a severe beating. Ms. Fisher told the police that Edward Rodriguez assaulted her earlier in an apartment on South California Street. Fisher stated that Rodriguez was now asleep in the apartment, and she consented to go with the police to unlock the door with her key, so that the police officers could enter and arrest him. During this conversation, Fisher several times referred to the apartment as "our" apartment and said that she had clothes and furniture there. Whether she indicated that she currently lived at the apartment, or only that she used to live there, was unclear. The police then drove to the apartment on South California Street where Fisher unlocked the door with her key and gave the police officers permission to enter. In the apartment, in plain view, was drug paraphernalia and a white powdery substance that police later analyzed to be cocaine. In the bedroom the police found Rodriguez and discovered additional containers of a white powdery substance.

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[27] 462 U.S. 213 (1983).

[28] *White*, 47 Crim. L. Rep. (BNA) at 2150.

[29] *Id.* at 2151.

[30] *Id.*

[31] 47 Crim. L. Rep. (BNA) 2186 (U.S. June 21, 1990).

[32] *Id.*

The trial court granted the defense motion to suppress the evidence. It found that Fisher was not a usual resident, but rather an infrequent visitor at the apartment on South California Street. The court, therefore, concluded that a fourth amendment violation had occurred because Fisher had no actual authority to enter Rodriguez' apartment. The intermediate appellate court affirmed the trial court's decision.

The Supreme Court, however, rejected the trial court's conclusion respecting the fourth amendment violation. The Court indicated that the fourth amendment protection against unreasonable searches does not require actual authority to support a consent search.[33] The lack of actual authority did not require suppression of evidence, nor did a reasonable—albeit mistaken—belief by the officer require suppression. The Court cited a number of examples in which the fourth amendment did not require factual accuracy.[34] It admitted, however, that the language in prior cases concerning whether apparent authority could form the basis for consent was ambiguous.[35] The opinion noted that apparent authority is a ground for consent when officers reasonably believe that an individual has authority to consent and when the surrounding circumstances do not indicate a lack of authority. Implicit in the Court opinion is the proposition that, when reasonable grounds exist to believe the person has authority, the police officer does not have an obligation to make an inquiry. The obligation to make an inquiry probably occurs when no reasonable officer could believe that the person has authority or when the situation is ambiguous. Because the state court did not address apparent authority, the majority remanded the case for the consideration of that issue.

The dissent in *Rodriguez* indicated that the majority actually manufactured the ambiguity in prior cases because *Stoner v. California*[36] already had rejected apparent authority as a basis for a consent search.

Military Rule of Evidence 314(e)(2) states that "[a] person may consent to a search of his or her person or property, or both, unless control over such property has been given to another. A person may grant consent to search property when the person exercises control over that property." This language does not sanction consent based upon apparent authority, nor does it prohibit it. The rule's silence means military practitioners should turn to the *Rodriguez* case. The analysis indicates that the drafters intended Military Rule of Evidence 314(e)(2) to restate "prior law in this provision and not to modify it any degree."[37] Practitioners must remember that apparent authority is a ground for consent when officers reasonably believe that an individual has authority. When the circumstances do not comport with this apparent authority, or ambiguity exists, they very well may have an obligation to ask what relationship the consenter has to ensure that the person owns, uses, possesses, or has sufficient control over the place or item forming the object of the search.

Sobriety Checkpoints

In *Michigan Department of State Police v. Sitz* a five-justice opinion[38] held that sobriety checkpoints at which the police stop all cars and inspect all drivers do not violate the fourth amendment. In reaching this conclusion the Court discussed five factors pertaining to sobriety checkpoints: 1) the applicable standard; 2) public interest; 3) available alternatives; 4) effectiveness of the checkpoint; and 5) level and scope of the officers' discretion.

The Applicable Standard

Using the balancing approach articulated in *Brown v. Texas*,[39] the majority found that protecting the public from drunk drivers is a significant state interest and the use of sobriety checkpoints represents a program that advances that interest. The Court further found that the checkpoints are only minimally intrusive. Accordingly, balancing a significant state interest against a minimal intrusion, the majority concluded that the checkpoints do not violate the fourth amendment even though the police that operate the checkpoints possess no individualized suspicion. The Court rejected the argument that the state must show some special governmental need "beyond the normal need" for criminal law enforcement before a balancing analysis is appropriate.[40] The majority, however, did not design the language in its opinion to repudiate the prior cases of the Court dealing with police stops of

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[33] *Id.* at 2188.

[34] *Id.*

[35] *Id.* at 2189.

[36] 376 U.S. 483 (1964).

[37] Mil. R. Evid. 314(e)(2) analysis at A22-26.

[38] 47 Crim. L. Rep. (BNA) 2155 (Rehnquist, C.J., White, O'Connor, Scalia, and Kennedy, J.J.); *see id.* (Blackmun, J., concurring) (agreeing with public interest in curbing the number of deaths on the nation's highways); *id.* (Brennan, Marshall, and Stevens, J.J., dissenting).

[39] 443 U.S. 47 (1979).

[40] *Sitz*, 47 Crim. L. Rep. (BNA) at 2156 (citing National Treasury Employees Union v. Von Raab, 109 S. Ct. 1384, 1390 (1989)).

motorists on the highway and the utilization of a balancing analysis. Justices Brennan, Marshall, and Stevens dissented in *Sitz*, expressing their disagreement with the conclusion that the intrusion is minimal and the roadblock program is effective.

Public Interest

The *Sitz* majority stated that "[n]o one can seriously dispute the magnitude of the drunken driving problem or the State's interest in eradicating it. Media reports of alcohol-related death and mutilation on the Nation's roads are legion. The anecdotal is confirmed by the statistical."[41] The majority then supported its concern of the problem's magnitude by citing statistical data from Professor LaFave's treatise on search and seizure.[42] Justice Stevens' dissent, however, indicated that it was "inappropriate for the Court to exaggerate that concern by relying on an outdated statistic from a tertiary source."[43] He suggested that the figures concerning alcohol related deaths have been on a decline between 1982 and 1988.[44] The majority responded to Justice Stevens' point by suggesting that the declines may be the result of police departments experimenting with sobriety checkpoints.[45] On the other hand, Justices Brennan and Marshall did not "dispute the immense social cost caused by drunken drivers."[46]

Reasonable Alternatives

The majority in *Sitz* indicated that the choice between "reasonable alternatives remains with governmental officials who have a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers."[47] In the program implemented in Michigan, on a one-time basis, for seventy-five minutes, police stopped 126 vehicles for less than thirty seconds each, and detained two drivers for further examination. Justice Stevens' dissent, however, indicated that patrols to arrest drunk drivers seemed to be more effective than checkpoints. Neither the dissenters nor the majority, however, spent a significant amount of time on the impact that checkpoints have on a community with respect to driving habits, drinking habits, and overall deterrence of drunk driving.

Scope of Intrusion

At the Michigan checkpoint, police stopped all drivers and examined them briefly for evidence of intoxication. Whether the police required the driver to exit the car is unclear, but apparently they did not. Devices are now available to determine intoxication. The driver merely rolls down the window and allows the officer to put the device near or just inside the car. If a sign of intoxication existed, the police would ask the driver to pull from the flow of traffic for further examination. The majority indicated that the Michigan stops, for less than thirty seconds each, measured objectively as to time and intensity, are minimally intrusive. With respect to the issue of "subjective intrusion" to the motorist, the Court indicated that the Michigan courts had misread the Supreme Court cases concerning the degree of "subjective intrusion" potentially required to generate fear and surprise.[48] The Supreme Court noted that the fear and surprise engendered in law abiding citizens is appreciably less in the case of checkpoints than under other circumstances because police officials operate the checkpoints pursuant to guidelines and uniformed police officers stop every approaching vehicle. In his dissent, however, Justice Stevens indicated that a significant difference existed between sobriety checkpoints and permanent checkpoints at a border or permanent checkpoints that look for illegal aliens. He noted that officials easily can standardize immigration checkpoints with most of the stops during daylight hours, while police almost invariably operate sobriety checkpoints at night with unlimited discretion to detain the driver on the basis of the slightest suspicion, such as his or her complexion, dress, or bloodshot eyes. Under the circumstances of a sobriety checkpoint, Justice Stevens pointed out, any driver who consumes a glass of beer—or even a sip of wine—would have the burden of demonstrating that he or she is not intoxicated.

Discretion

Because the Michigan checkpoint involved stopping every vehicle and inspecting all drivers for signs of intoxication, the conditions limited the discretion of the officers. The *Sitz* opinion implies that letting police officers make the decisions concerning when and where

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[41] *Id.*

[42] *Id.* (citing 4 W. LaFave, Search and Seizure: A Treatise beyond the Fourth Amendment, § 10.8(a) (2d ed. 1987)).

[43] *Id.* at 2160 n.7.

[44] *Id.*

[45] *Id.* at 2156 n.*.

[46] *Id.* at 2158.

[47] *Id.* at 2157.

[48] *Id.* at 2156-57.

to set up a checkpoint, when to perform a stop, and how to make the check might lead to the checkpoints' invalidity. The Court eventually should address what type of control over the discretion of police officials at the checkpoint is necessary to ensure its constitutionality. As *Florida v. Wells*[49] indicated, however, a complete lack of guidelines will violate the fourth amendment.

The Military Rules of Evidence seem to be silent on the sobriety checkpoints. Arguably, a checkpoint is an inspection under Military Rule of Evidence 313(b), which seems to limit these checks to entrance and exit points.[50] Nevertheless, a neutral and detached official—usually an installation commander—must authorize such an inspection, and he or she should limit the discretion of the officers conducting the checkpoints.

Cross-examination and Confrontation

On June 29, 1990, the Court decided two cases that will have drastic impacts on trying child abuse cases in the United States. Both cases resulted in five-justice majority decisions written by Justice O'Connor. These cases deserve study by legislators, judges, prosecutors, and defense counsel concerning their impact on future cases—not only during the trial stage, but also during the investigative stage.

Cross-examination

In *Idaho v. Wright*,[51] the Court held that the "particularized guarantees of trustworthiness" required for admission of hearsay statements not within "a firmly rooted hearsay exception" under the confrontation clause of the sixth amendment derive from the totality of circumstances surrounding the making of the statement. The *Wright* opinion overrules military cases that indicate that corroboration and reputation of the declarant for trustworthiness may satisfy the sixth amendment requirements and the guarantees of trustworthiness requirements under Military Rules of Evidence 803(24) and 804(b)(5).

The state jointly charged the defendants, Laura Lee Wright and Robert L. Giles, with two counts of lewd conduct with minor children under sixteen. Under a separation agreement between Laura Lee Wright and Lewis Wright, each parent had custody of their older daughter for six consecutive months. The allegations against the defendant surfaced when the older daughter, who was five years old, told Cynthia Goodman, Lewis Wright's female companion, that Giles had sexual intercourse with her while Laura Lee Wright held her down and covered her mouth. She also indicated that the defendants had done the same thing to her two-year-old sister. Goodman reported the older daughter's statements to the police the next day and took her to the hospital. A pediatrician at the hospital, with extensive experience in child abuse cases, examined the older daughter and found evidence of sexual abuse. That day, authorities took the younger daughter into custody. The same pediatrician examined the younger daughter the next day and found conditions "strongly suggestive of sexual abuse with vaginal contact" occurring approximately two to three days prior to the examination.

A voir dire examination of the younger daughter, who was three years old at the time of trial, determined that she was capable of testifying; the parties agreed, however, that she was not capable of communicating to the jury. As a result, the examining physician testified as to his conversation with the younger daughter. The doctor indicated that he had made summarized notes of the conversation with the younger daughter. He stated, however, that he did not record her statements and that his notes were not sufficiently detailed to record any changes in the child's effect or attitude. The trial court admitted the statement of the younger daughter under Idaho's residual hearsay exception, which is exactly the same as the first sentence in Military Rule of Evidence 803(24). The Idaho State Supreme Court upheld the conviction of Giles.[52] In reviewing the conviction of Laura Lee Wright, however, the court found that the physician's interview technique was inadequate because he did not record the questions and answers on video tape and because he used leading questions during the interview.[53] Additionally, the statements lacked trustworthiness because the physician who performed the interview had a preconceived idea of what the child should be disclosing.[54] The state court noted that children are susceptible to suggestions, which may lead to the admission of unreliable statements unless the offering party records the results of the interview.[55] The state court concluded that the younger daughter's statement did not have guarantees

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[49] 47 Crim. L. Rep. (BNA) 2021 (U.S. April 18, 1990). In *Delaware v. Prouse*, 440 U.S. 648, 664 (1979), the Court held that allowing the officer to question all oncoming traffic, and to "waiv[e] traffic through when a predetermined number of cars have backed up" was permissible. *See also* State v. Wetzel, 47 Crim. L. Rep. (BNA) 1185 (N.D. May 14, 1990) (discretion limited when officer chooses "next available vehicle when safe").

[50] *Cf.* Mil. R. Evid. 314(c).

[51] 47 Crim. L. Rep. (BNA) 2250 (U.S. June 29, 1990).

[52] 775 P.2d 1224 (1989).

[53] *Id.* at 1227.

[54] *Id.*

[55] *Id.* at 1230.

of trustworthiness as required by the confrontation clause of the sixth amendment.[56]

Justice O'Connor writing for the majority repeated the "general approach" in determining whether a statement's admission meets the requirements of the Confrontation Clause.[57] First, Justice O'Connor noted that the prosecution must produce, or demonstrate, the unavailability of the declarant whose statements the prosecution seeks to introduce. Second, once the government has shown that a witness is unavailable, it must demonstrate that the statement is reliable because it falls within a firmly rooted hearsay exception, or otherwise has "particularized guarantees of trustworthiness." Justice O'Connor pointed out that the court must determine whether a statement is reliable by examining circumstances surrounding the making of a statement. The court may not consider corroboration. She then set forth six factors that a court may use to establish trustworthiness: 1) spontaneity; 2) consistent repetition; 3) mental state of the declarant; 4) use of terminology unexpected of a young child; 5) no motive to fabricate; and 6) in some circumstances, change of demeanor while making a statement.[58] In the *Wright* majority's opinion, an appellate court may use the factor of corroboration to establish that erroneous admission of the statement was harmless beyond a reasonable doubt—a factor that a court may *not* use to establish trustworthiness at the *trial* level.

The *Wright* Court refused to establish under its supervisory role federal constitutional procedural guidelines that the lower courts must follow before a statement would be admissible.[59] The majority did, however, agree that certain procedural guidelines may well enhance the reliability of a statement.[60]

The dissent indicated that the majority devised a rule that was as "unworkable as it [was] illogical".[61] In effect, the dissent asserted that the majority disregarded the number of cases that have used corroborating evidence to support the reliability of the child's statement.[62] The *Wright* dissent specifically listed the four factors that corroborated the daughter's statement:

> (1) physical evidence that she was the victim of sexual abuse; (2) evidence that she had been in the custody of the suspect at the time the injuries occurred; (3) testimony of the older daughter that their father had abused the younger daughter, thus corroborating the younger daughter's statement; and (4) testimony of the older daughter that she herself was abused by their father, ...[63]

What Is The Impact of Wright?

First, the *Wright* case overruled a number of military cases. Second, while the Court refused to set forth any bright line rules that lower courts constitutionally must follow, persons interviewing potential witnesses in child abuse and sexual abuse cases definitely should follow certain procedural rules or guidelines in the future. Third, while the *Wright* case deals with residual hearsay, the case is not limited to the application of the residual hearsay rule. Accordingly, the case's general approach to the confrontation requirement actually applies to Military Rules of Evidence 801, 803, and 804, and may have an impact on Article 49. Fourth, commentators must examine the impact of *Wright* in light of *Maryland v. Craig*.[64] Will *Wright* and *Craig* encourage substitutes for face-to-face confrontations and further exceptions to the hearsay rules?

In the past, the military courts have used extrinsic evidence to establish the indicia of reliability for the out of court statements of nontestifying declarants. The dissenting justices actually noted that one of the military cases that *Wright* overruled was the decision of Judge Pedar Wold in *United States v. Quick*.[65] The case that truly served as the lodestar for the military, however, was *United States v. Hines*.[66] *Hines* indicated that a court may use a number of factors to establish an indicia of reliability or guarantee of trustworthiness: 1) the declarant's making the statement under oath; 2) testimony providing detailed circumstances of how the person conducted the interview; 3) the declarant's being a member of the accused's household and being financially dependent upon the accused; 4) the fact that none

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[56] *Id.* at 1231.

[57] *Wright*, 47 Crim. L. Rep. (BNA) at 2252.

[58] *Id.* at 2254, 2255.

[59] *Id.* at 2253.

[60] *Id.*

[61] *Id.* at 2256.

[62] *Id.* at 2256 n.2.

[63] *Id.* at 2257-58.

[64] 47 Crim. L. Rep. (BNA) 2258 (U.S. June 27, 1990); *see infra* notes 75 through 81 and accompanying text.

[65] 22 M.J. 722 (A.C.M.R. 1986), *cited in Wright*, 47 Crim. L. Rep. (BNA) at 2256 n.2.

[66] 23 M.J. 125 (C.M.A. 1986).

of declarants recanted their statements; 5) the refusal of each declarant to testify as tending to reaffirm the veracity of their out of court statements; 6) the reputation of each declarant for truthfulness; 7) the lack of the declarant's motivation to falsify the statement;[67] 8) the declarant's having first hand knowledge of the events; 9) corroboration of the declarant's statement by the third parties; and 10) the accused's confessing voluntarily to all the acts allegedly mentioned by the declarant.[68] Many of these factors do not involve circumstances surrounding the taking of a statement; thus, as extrinsic evidence, the moving party must use these factors to "bootstrap" the admissibility of the hearsay statements.

What a court might considered as being "extrinsic evidence" or "circumstances not surrounding the statement" may be the next battlefield. In *United States v. Hughes*[69] the court held that a statement by the accused's wife who was available, but whom the accused did not call, was admissible in evidence. Her failure to testify was out of a desire to protect her husband. The *Hughes* court noted that her statement was

> identical in all pertinent parts with appellant's own pretrial admissions. Secondly, though the statement was given to law-enforcement officers, which might generally present a problem, . . it is not a problem here: As the military judge found, Mrs. Hughes is well-educated and an intelligent adult; the interview was short (about 20 minutes) and not oppressive; it was held where Mrs. Hughes worked, not at the Office of Special Investigations (OSI) headquarters; the OSI agent's testimony indicates that, in fact, Mrs. Hughes controlled the direction of the interview; at no time after giving the statement did she attempt to clarify it or recant; and, finally, there is no hint in the case anywhere that Mrs. Hughes would have any motive to hurt her husband—from all appearances, they had a sound martial relationship, with no reason for her to lie adversely to her husband's interests.[70]

Is the education and intelligence of Mrs. Hughes an extrinsic fact, or is it a circumstance surrounding the interview? What about the location of the interview?—does it make a difference if it occurred at police headquarters, in the individual's home, or at the hospital? What happens later when the declarant makes no attempt to clarify or recant? Lastly, is the lack of a motive to falsify a statement a circumstance surrounding the statement or is it extrinsic evidence? These questions may lead commentators to agree with the *Wright* dissent, when it pointed out that the rule may be as "unworkable as it is illogical."[71] While the *Wright* Court did not establish any procedural guidelines, some guidelines may exist that would help to establish reliability of these pretrial statements. Some suggested guidelines are as follows: 1) the person taking the interview should record it either through an audio means or a combination of audio and video means. Recording will help the trial court determine the extent of the information communicated to the witness and the extent of suggestiveness; 2) the individual conducting the interview should be independent and not a regular employee of the prosecution or investigative agency; and 3) only the person conducting the interview and a parent should be present during any phase of the interview.

Rather than relying on the residual hearsay rules, counsel would be wise to rely upon the firmly rooted hearsay exceptions, which are so trustworthy that adversarial testing would add little to reliability. Some firmly rooted exceptions are Military Rules of Evidence 803(2), 803(3), 803(4), 804(b)(1), and 801(d)(2)(E).

Confrontation

In *Coy v. Iowa*,[72] the Court expressly left "for another day ... the questions whether any exceptions exist" to the right of face-to-face confrontation. The majority recognized that certain exceptions "would surely be allowed only when necessary to further an important public policy."[73] In a concurring opinion joined by Justice White, Justice O'Connor insisted that the right to a face-to-face confrontation is "not absolute".[74] She recognized the difficulties in identifying and prosecuting individuals for child abuse, but noted that the Constitution requires a face-to-face meeting between the witnesses and the defendant absent an exception. Furthermore, Justice O'Connor noted that any exception may not be a generalized exception based on a legislative presumption of trauma but should derive from "findings that these particular witnesses needed special protec-

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[67] *Wright*, 47 Crim. L. Rep. (BNA) at 2254. Justice O'Connor indicated that a lack of motive to fabricate may establish reliability. *See id.*

[68] 23 M.J. at 135-36.

[69] 28 M.J. 391 (C.M.A. 1989).

[70] *Id.* at 395.

[71] *Wright*, 47 Crim. L. Rep. (BNA) at 2257.

[72] 487 U.S. 1012 (1988).

[73] *Id.* at 1021.

[74] *Id.* at 1022.

tion."[75] *Maryland v. Craig*[76] answered the question that the *Coy* Court left open when it held that the confrontation clause of the sixth amendment does not prohibit a child witness from testifying against the defendant outside of the defendant's physical presence by way of a one-way closed circuit television.

The state charged the defendant in *Craig* with abuse committed upon a six year old who attended a kindergarten and prekindergarten center owned and operated by the defendant. The Court upheld the use of the one-way television when the trial court makes "a case-specific finding of necessity"[77] for such procedures. The Court declined "to establish, as a matter of federal constitutional law, any ... evidentiary prerequisites,"[78] such as the failure to explore a less restrictive alternative or to observe personally the child's behavior in the defendant's presence. The *Craig* Court found that the trial court's basing its conclusion on the testimony of an expert, that the child's ability to communicate would be impaired if testimony took place in the defendant's presence, was sufficient to find the requisite necessity. The majority did recognize that certain prerequisites for the use of the one-way television procedure would strengthen the grounds using protective measures, but the prerequisites were not necessary as a matter of constitutional law. For the purposes of constitutional analysis, the *Craig* Court found that the Maryland statutory procedure preserved all elements of the confrontation right:

> [T]he child witness must be competent to testify and must testify under oath; the defendant retains full opportunity for contemporaneous cross-examination; and the judge, jury, and defendant are able to view (albeit by video monitor) the demeanor (and body) of the witness as he or she testifies.[79]

Presently, two cases are pending before the Court of Military Appeals addressing the right of confrontation. In *United States v. Romey*[80] the court will determine whether it violates the defendant's right to have the victim give her testimony to her mother who then repeats it verbatim. Although the judge made no specific findings on the record, the victim identified her father and testified concerning the time and place she lived with him. She did this with little difficulty. However, when asked, "What are we going to talk about (today)?" she failed to respond. When asked if she would like to testify by whispering to her mother, she responded in the affirmative. When asked by the judge if she could talk without her mother, she did not respond. The victim then underwent some preliminary questioning to which she did not respond. The court held that even though the trial court made no specific findings, letting the victim whisper her testimony to her mother, whom the court then told to repeat verbatim, was permissible. In another case, *United States v. Thompson*,[81] the court will determine whether allowing the witnesses in a judge alone trial to face their backs to the accused is permissible. The court held that having a mental health specialist testify concerning the anxiety and inability of the two victims to respond when face-to-face with the accused satisfied the requirements for specific findings on the record necessary to allow an exception to the face-to-face confrontation requirement.

Craig and *Wright* may encourage states to establish procedures for videotaping testimony for simultaneous or delayed transmittal. Twenty-seven states[82] have enacted such statutes, and the military may be well to consider amending its rules. Without such a rule, judges may indicate that they have the authority to allow simultaneous recording by use of one-way or two-way closed circuit television. Additionally, by setting forth the procedures adopted by Maryland, a military rule could specify what factors a judge must examine and would ensure uniformity of the procedure in military practice. These cases also may encourage states that do not have a residual hearsay rule to adopt one. *Craig* and *Wright*, on the other hand, could have the opposite effect because the residual hearsay rule requires an additional showing of reliability. Therefore states may cut back on these rules to force the prosecution to rely on firmly rooted exceptions.

Custodial Interrogation

In *Pennsylvania v. Muniz*[83] the Court reviewed various aspects of certain police station procedures used after police arrested Inocencio Muniz for drunk driving. Because the police accomplished these procedures without informing Muniz of his *Miranda*[84] rights, the Court addressed whether the verbal responses and comments of Muniz were "testimonial responses to custodial interrogation"[85] and therefore inadmissible in the absence of

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[75] *Id.* at 1021.

[76] 47 Crim. L. Rep. 2258 (U.S. June 27, 1990).

[77] *Id.* at 2264.

[78] *Id.*

[79] *Id.* at 2261.

[80] 29 M.J. 795 (A.C.M.R. 1989), *petition granted*, 30 M.J. 36 (C.M.A. 1990).

[81] 29 M.J. 541 (A.F.C.M.R. 1989), *petition granted*, 29 M.J. 438 (C.M.A. 1990).

[82] Forman, *To Keep the Balance True: The Case of* Coy v. Iowa, 40 Hastings L.J. 437, 440 (1989).

[83] 47 Crim. L. Rep. (BNA) 2167 (U.S. June 18, 1990).

[84] Miranda v. Arizona, 384 U.S. 436 (1966).

[85] *Muniz*, 47 Crim. L. Rep. (BNA) at 2167.

the predicate rights warning. Muniz went through a routine, videotaped procedure for suspected drunk drivers. Muniz knew that the police were taping his actions and voice, but law enforcement personnel had neither advised him of his rights, nor had he waived them.[86]

The initial issue addressed by the *Muniz* Court involved a series of questions that police personnel asked Muniz. These questions concerned Muniz's name, address, height, weight, eye color, date of birth, and current age. Muniz's responses were both confused and slurred.[87] Initially the Court noted that the physical characteristics of Muniz's responses, specifically his inability to articulate words clearly, were akin to standing in a lineup[88] or providing a handwriting sample;[89] therefore, the responses were not "testimonial" within the protections of *Miranda* and the fifth amendment.[90] With respect to the questioning itself and the content of the responses, Justice Brennan, joined by Justices O'Connor, Scalia, and Kennedy, recognized a "routine booking question" exception to *Miranda*. Under this exception, police need not give a rights warning prior to asking questions that are necessary for routine record keeping.[91]

The "routine booking exception" failed, however, to generate majority support. Chief Justice Rehnquist, joined by Justices White, Blackmun, and Stevens, rejected the conclusion that the responses to the "booking questions" were testimonial, and determined that the responses were simply outside the privilege against self-incrimination.[92] Finally, Justice Marshall pointed out that so-called booking questions likely would produce incriminating responses; therefore, he stated that he would reject any "routine booking question" exception to *Miranda*. Accordingly, without the exception, Justice Marshall viewed the unwarned and potentially incriminating responses as inadmissible.[93]

Although eight justices seemingly would permit routine booking questions similar to those in *Muniz*, two factors weighed against their concluding that any per se rule or exception existed. First, the four justices willing to recognize an "exception" did so with two notable limitations: 1) the information must be biographical in nature; and 2) gathering the information must be "necessary to complete booking or pretrial services."[94] Second, Justice Brennan was able to articulate his "exception" in light of a state court's finding that police asked the questions in this instance for record keeping purposes—not to secure incriminatory statements.[95]

Even though no clear exception exists, routine booking questions are permissible. The law should view these questions as being outside the privilege against self-incrimination simply because the answers do not incriminate, do not solicit belief, and do not call for mental evaluation by a suspect. Therefore, military law enforcement authorities may ask identifying and biographical questions, to include unit of assignment. They should, however, exercise caution to ensure that the questions are in fact routine, and not part of a scheme to solicit testimonial, incriminatory responses.

The second aspect of the police station procedure examined in *Muniz* was a single question asked of Muniz: "Do you know the date of your sixth birthday?" When Muniz stumbled on the response to this question, the police asked him, "When you turned six years old, do you remember what the date was?" Muniz answered, "No, I don't."[96] A majority of the justices concluded that Muniz's response was both testimonial and

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[86] *Id.* at 2168.

[87] *Id.* at 2169. The opinion noted that Muniz's answers were incriminatory because of both their delivery and their context. Muniz stumbled over his address and age, and he failed to speak clearly. The Court ruled these responses as being incriminatory because they supported an inference that he was intoxicated. *Id.*

[88] *See* United States v. Wade, 388 U.S. 218 (1967); *see also* United States v. Webster, 40 C.M.R. 627 (A.C.M.R. 1969).

[89] *See* United States v. Mara, 410 U.S. 19 (1973); Gilbert v. California, 388 U.S. 263 (1967); *see also* United States v. Hardin, 18 M.J. 81 (C.M.A. 1984).

[90] *Muniz*, 47 Crim. L. Rep. (BNA) at 2169. The holding that the characteristics of voice are akin to physical characteristics, which the fifth amendment does not protect, is consistent with the military practice. *See* United States v. Akgun, 24 M.J. 434 (C.M.A. 1987); United States v. Chandler, 17 M.J. 678 (A.C.M.R. 1983).

[91] The "booking questions" also may fall outside the definition of "interrogation" as set forth in *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980) (defining "interrogation" as "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect").

[92] *Muniz*, 47 Crim. L. Rep. (BNA) at 2173.

[93] *Id.* at 2174-75.

[94] *Id.* at 2172.

[95] *Id.*

[96] *Id.* at 2168.

incriminatory, thus falling within the protections afforded by *Miranda* and the fifth amendment.[97] To reach this conclusion, Justice Brennan first distinguished between testimonial and nontestimonial communications. Using *Schmerber v. California*[98] as illustrative of the nontestimonial end of the spectrum, Justice Brennan highlighted the difference between "being compelled himself to serve as evidence" and, as in Muniz's case, "being compelled to disclose or communicate information or facts ..."[99] Muniz's response was testimonial because it communicated a fact or belief. Further, when Muniz could not recall the date, police confronted him with the "cruel trilemma" of being truthful by admitting that he did not know the answer, of lying, or of remaining silent.[100] Because the "I don't know" response supported an inference that Muniz's mental facilities were impaired, the testimonial aspect of the statement was incriminatory.[101]

Chief Justice Rehnquist, dissenting on this point, did not agree that the reply was testimonial. Rather, the dissent viewed that requiring Muniz to "do a simple mathematical exercise" was no different than requiring him to speak or write, which are permissible, nontestimonial acts designed to reveal mental coordination.[102] Because drawing blood is permissible to determine blood/alcohol content and thus the effects of alcohol on the body, Justice Rehnquist posited that police may examine the effect of alcohol on the mental processes by requiring speech in the absence of *Miranda* warnings and a waiver.[103]

In the third facet of the *Muniz* opinion, the Court addressed the admissibility of video and audio recordings of Muniz's physical sobriety tests. During the instructions for the tests and during his performance of the tests, Muniz made incriminatory statements.[104] While the fifth amendment did not protect Muniz's physical performance,[105] the lower court had suppressed the audio recordings as violative of *Miranda*.[106] Eight justices disagreed, noting that the request to perform sobriety tests and the instructions accompanying those tests required no verbal response. Thus, the justices concluded that the procedure was not a custodial interrogation that required predicate warnings. The justices went on to note that the police had designed the instructions not for interrogation, but solely to ensure that Muniz understood the otherwise lawful tests.[107] Accordingly, they considered the verbal utterings of Muniz, which consisted mostly of excuses as to why he could not perform some tests, as voluntary and admissible.

In connection with two of the physical tests, police requested Muniz to count while he was performing the tests. Although he successfully counted, he slurred his speech. In a footnote to his opinion in *Muniz*, Justice Brennan pointed out that the fifth amendment did not protect the quality of Muniz's speech because it was not testimonial; however, the request to count apparently constituted custodial interrogation.[108] The Court left for another time its deciding whether counting or not counting in response to police direction is testimonial within the meaning of the fifth amendment.

The final point addressed in the *Muniz* opinion concerned statements made by Muniz during a request that he take a breathalyzer examination. During an officer's explanation of the state's implied consent law, Muniz asked questions and commented on his state of intoxication. Muniz offered to take the test a few hours later, after drinking water. Ultimately, however, he refused to take the test.[109] The Court held that the police did not prompt Muniz's comments on his intoxication by a custodial interrogation. As was the case with the physical performance tests, the Court held that the officer merely was giving proper instructions to Muniz and was answering Muniz's questions about the implied consent law. Therefore, the Court found specifically that the officer's conduct was "attendant to the legitimate police procedure" and required no warnings.[110] Consequently, Muniz's statements were voluntary and admissible.

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[97] Justice Marshall joined with Justice Brennan's opinion with respect to this issue. *Id.* at 2174 (Marshall, J., dissenting).

[98] 384 U.S. 757 (1966).

[99] *Muniz*, 47 Crim. L. Rep. (BNA) at 2170 n.7 (quoting Doe v. United States, 487 U.S. 201, 211 n.10 (1988)).

[100] *Id.* at 2171. The Court noted that silence is not an available option because of the coercive surroundings of the police station. *Id.*

[101] *Id.*

[102] *Id.* at 2173.

[103] *Id.*

[104] *Id.* at 2172.

[105] *Id.* at 2172. The Court noted that Muniz did not challenge the lower court's conclusion that standard sobriety tests do not require testimonial acts. Therefore, the Court did not address whether police could compel physical sobriety tests without warnings. *Id.* at 2172 n.16.

[106] 547 A.2d 419, 423 (1988).

[107] *Muniz*, 47 Crim. L. Rep. (BNA) at 2172.

[108] *Id.* at 2172 n.17.

[109] *Id.* at 2172.

[110] *Id.* at 2173.

Muniz stands as something of a contrast to other cases this term that dealt with criminal procedure under the fourth, fifth, and sixth amendments. Rather than provide federal constitutional standards to guide police conduct, the *Muniz* opinion tended to define and draw lines between permissible and impermissible conduct. Law enforcement personnel can ask routine, biographical questions for booking purposes, but they may not ask other unwarned questions soliciting a fact or belief from a suspect. Officers may require simple speech and physical acts, but the fifth amendment and *Miranda* will continue to protect testimonial acts. Officers may perform those acts attendant to routine procedures and answer a suspect's questions relating to those procedures, but officers may not capitalize on a suspect's weaknesses by using routine procedures to obtain statements. The lines may become blurred, however, when the Court ultimately wrestles with the issue of whether requiring a suspect to count is testimonial.

Because the protections afforded by article 31 parallel the protections provided by the fifth amendment,[111] the Court's resolution of the issues in *Muniz*, particularly the "sixth birthday question," has direct application to military practice.[112] However, while article 31 and *Muniz* compel warnings and waiver before police officers may ask the "sixth birthday question" to inquire into mental functioning, investigators must first determine whether they can obtain a knowing, voluntary, and intelligent waiver from a drunk.[113] A certain paradox exists in arguing that responses to questions are indicative of impaired mental processes and arguing that those same responses were the product of a knowing, intelligent waiver of rights. Obviously, any interrogation should wait until the suspect can understand and make intelligent elections.

[111] United States v. Armstrong, 9 M.J. 374, 383, (C.M.A. 1980); United States v. Eggers, 11 C.M.R. 191 (C.M.A. 1953); *see also* United States v. Lloyd, 10 M.J. 172 (C.M.A. 1981).

[112] Mil. R. Evid. 301(a) ("The privileges against self-incrimination provided by the Fifth Amendment to the Constitution of the United States and Article 31 are applicable only to evidence of a testimonial or communicative nature").

[113] *See* United States v. Keller, 38 C.M.R. 305 (C.M.A. 1968).

Note From the Field

The Paralegal in Army Legal Practice

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Introduction

Fort Ord's legal office has undergone major restructuring during the past two years. Perhaps the most far-reaching change involved converting seven civilian positions from clerks and court reporters to paralegal specialists. The result has been a legal organization having far greater depth, flexibility, output, and expertise than the previous office structure. Similar restructuring throughout the Army could enhance productivity significantly in today's constrained fiscal environment.

This article offers suggestions for restructuring traditional staff judge advocate (SJA) offices by making paralegals a fundamental element of Army legal practice. Although the article will focus on Department of the Army (DA) civilian positions, the authors recognize that the Army often assigns noncommissioned officer paralegals to sections, such as legal assistance and Magistrate's Court, that mirror civilian paralegal slots. Much of the article's discussion is, therefore, applicable to both military and civilian paralegals.

Background

Before restructuring, SJA clerical positions at the Fort Ord Office of the Staff Judge Advocate (OSJA) office were hard to fill and turnover among employees was

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high. These problems forced OSJA personnel to examine the office's Table of Distribution and Allowances (TDA) and hiring practices. Office personnel concluded that the office had deficiencies in three important areas that were probably common to all Army legal offices: 1) career progression; 2) career intern programs; and 3) grade structure.

Career Progression

Army law offices lack a properly developed civilian grade structure. In spite of the technical nature of Army legal work, the personnel structure divides SJA positions between low grade clerical positions and high grade attorney positions. The Army places insufficient emphasis on mid-level technical or paraprofessional positions. The lack of opportunity for adequate career growth among lower graded employees contributes to high turnover and limits the number of potential job applicants.

Career Intern Programs

Unlike many installation staffs, legal offices do not have career intern programs for civilian employees. Career intern programs successfully meet mid-to-high level staffing needs through planned intake of entry level personnel with high potential.[4]

Grade Structure

Too often, the government announces jobs at the full performance grade level (e.g. GS-06) rather than at the trainee progression level (e.g. GS-05/07/09). Unfortunately, this practice limits competition. Typically, only applicants with requisite legal experience at the next lower grade qualify for consideration.

Additional Restructuring Factors

As Fort Ord SJA office personnel contemplated the deficiencies in career progression, career intern programs, and grade structure, additional factors became apparent. Force downsizing is becoming a reality. In the future, fewer attorneys may be available to carry out SJA office legal missions. In addition, even though automation is reducing clerical tasks, burgeoning legal responsibilities continue to tax SJAs' attorney resources. Likewise, while declining court-martial caseloads mean less work for court reporters,[5] reducing the numbers of court reporters on an SJA staff normally would impair its ability to respond to changing trends or short term surges in trial activity.

Restructuring Objectives

In devising Fort Ord's current organization, the objectives were clear, but OSJA did not develop an in-depth study or carefully drawn plan. Instead, the successful addition of a military paralegal to the legal assistance section, and the earlier experimentation with paralegals at Fort Leonard Wood, Missouri, convinced the Fort Ord SJA office to convert certain marginal clerical vacancies to civilian paralegal positions. From the beginning, the objectives were to increase dramatically the skill level and productivity of SJA support personnel and to replace excess support personnel with personnel who directly produce legal "products."[6]

Paralegal Structure

Perhaps acting as prisoners of a professional or clerical mind set, the Army has designed SJA offices without fully considering the tremendous potential in paraprofessional employees. The civilian legal community has recognized the invaluable contributions paralegals can make in a legal setting, and today the paralegal profession is one of the fastest growing professions in the United States.[7] Consequently, restructuring the Fort Ord SJA office around a paralegal building block predictably produced a more powerful, productive organization.

Positions

At Fort Ord, paralegals are as much a part of legal practice as lawyers. Paralegals serve in the following sections: Litigation and Claims, Administrative Law, Criminal Law, Legal Assistance, Magistrate's Court, and Trial Defense Service. The office created these paralegal jobs as driver, librarian, legal clerk, and clerk/typist positions became vacant or when the job descriptions no longer met current needs.

The SJA office converted two of Fort Ord's court-reporter positions to paralegal/court-reporter positions. These conversions have meant that incumbents enjoy higher grade levels; simultaneously, managers have enjoyed the resulting productivity increase during otherwise idle periods. These mixed positions require that the

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[4] Army Reg. 690-950, Civilian Personnel Career Management, chaps. 1-7 (31 Aug. 87).

[5] Report of Judge Advocate General of the Army, Annual Report on Military Justice, U.S. Court of Military Appeals, Washington D.C., at 27 (30 Sep. 88).

[6] *See generally* T. Peters & N. Austin, A Passion for Excellence 316-21 (1985) (entitled "Transformations and Enhancements: Small Wins, Debureaucratizing and Pockets of Excellence").

[7] G. Garza, *Use Them or Lose Them*, Cal. Law. (Apr. 90).

higher-graded paralegals: 1) perform their duties on a regular and continuing basis; 2) devote a significant and substantial part of their overall duty time—at least twenty-five percent of their time—to doing actual paralegal work; and 3) prioritize paralegal work for recruiting purposes.[8] Even with the twenty-five percent paralegal work requirement, at Fort Ord the paralegal/court-reporters typically can dedicate nearly forty percent of their time to paralegal tasks without neglecting their court reporter duties. With the declining number of courts-martial, the Fort Ord SJA office expects this conversion to help in justifying retention of the positions in the event of downsizing, while retaining enough court reporters to handle occasional surges in the caseload.

Career Internships

Fort Ord SJA personnel have based the grading structure of their paralegal program on a "career intern" concept. Most of Fort Ord's installation staff sections employ career interns. Career intern programs provide a "fast-track" to attract, train, and promote bright, highly-qualified applicants within civil service.

The SJA office hires a typical paralegal in a developmental position as a Paralegal Specialist, GS-950, at the 05, 07, or 09 grade level. Once hired under competitive procedures, the employee will receive noncompetitive promotions to the target grade level as he or she satisfies all qualifications and performance requirements for elevation. A bachelor's degree or a minimum of three years' of general experience can qualify an applicant for the GS-05 level, and one or two years' specialized legal experience can qualify applicants at the GS-07 or GS-09 grades.[9]

Career-track job announcements dramatically increased the number of job applicants and allowed the SJA office to select applicants of superior quality, even if they lacked the legal experience for their position's target grade level. Not only did long term SJA employees benefit from increased advancement opportunities, but outside candidates found careers at the SJA office more appealing than before. The career advancement provided to paralegals hired at lower grades in the career track has been a powerful tool for employee retention, providing stability to the SJA's work force.

Selection

Managers should work to maximize competition among job applicants and select only the best qualified candidates when hiring paralegals. In making selections, the Fort Ord program emphasizes energy, intellectual talent, and "people" skills more heavily than experience.

Because the Fort Ord program has built career ladders into its positions, competition is fierce, and the overall quality of applicants is superior. A natural tendency is to select routinely "in house" candidates to reward loyal service. Failure to select the applicants who are truly "best qualified," however, regardless of the source, simply may result in increased personnel costs without enhanced productivity. The Fort Ord OSJA, therefore, insists that the local Civilian Personnel Office forward all available applications for review.

Paralegal Duties

The SJA assigns paralegals throughout the office, in positions in which each paralegal can master the complexities of day-to-day activities. Paralegals free attorneys to concentrate on matters in which lawyers can be most effective and allow attorneys to focus on more professionally challenging legal work.

Once a paralegal has demonstrated that he or she really "knows the ropes" and has demonstrated that he or she possesses the capacity for more sophisticated and less structured tasks, the paralegal likely will develop the kind of relationship with the attorney staff in which the attorneys delegate to the paralegal work of increasingly greater levels of responsibility. Consequently, the job often grows significantly around the individual.

Paralegals also have assumed many special duties well beyond the office's routine. Quite often, paralegals undertake special projects that the SJA office could not accomplish otherwise. Examples of these undertakings include developing a homeowners' assistance program, starting a small claims court affirmative recovery practice, devising a title 10 collection program for the post hospital, and acting as the project officer for various programs such as the Army Communities of Excellence (ACOE) Program and building renovation projects.

In addition to the paralegals' assuming special duties, the United States Attorney for the Northern District of California has appointed one of Fort Ord's military paralegals as a law clerk. Under the supervision of the SJA, and within guidelines previously set by the United States Attorney, the paralegal handles all infraction cases heard in Magistrate's Court. This arrangement frees the assigned SJA attorney from routine traffic cases, allowing the attorney to concentrate on the more complex misdemeanor and felony cases.

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[8] Office of Personnel Management, Introduction to the Position Classification Standards, § III (Jan. 90) (Mixed Grade Positions).

[9] Office of Personnel Management, Handbook X-118, Qualification Standards for Positions Under the General Schedule, § TS 228 (Apr. 89) (Administrative Management and Specialist Positions).

Task Force

Fort Ord paralegals understand that while they technically still are assigned to the various branches, they can expect occasional lateral reassignments to meet office needs. In the short run, managers often pull paralegals from routine duties to work on projects or to provide a highly flexible task force capable of responding to fast-changing conditions in the legal environment.

This flexibility is extremely beneficial. During Operation Just Cause, the Division Headquarters heavily tasked the SJA office to provide services and support, not only to deploying soldiers, but also to family members remaining behind. Seven military attorneys deployed with the 7th Infantry Division; accordingly, office personnel remaining at Fort Ord had to assume substantially increased responsibilities. The SJA office, therefore, mobilized its paralegals to perform tasks that normally would have gone undone because of the shortage of attorneys. Managers scheduled paralegals to assist in processing soldiers for immediate deployment by having them work under the direct supervision of civilian attorneys on the Preparation for Overseas Movement (POM) lines. Other paralegals became involved in Fort Ord's local refund and reimbursement programs to help soldiers and family members whom the command had recalled early from Christmas leaves.

Environmental law is another area in which Fort Ord paralegals provide valuable service, not only to the attorneys, but to the installation as a whole. Attorneys train paralegals to assist the Environmental Branch of the Directorate of Engineering and Housing in preparing for outside inspections of hazardous waste management. Once notified that an inspection is imminent, the SJA dispatches paralegals to various units to pre-inspect records and other documentation, and to ensure compliance of hazardous waste sites with federal and state regulations. This ability to expand rapidly the number of hazardous waste inspectors enabled Fort Ord to attain 100% compliance during the most recent California Department of Health Services inspection in December 1989. Little doubt exists that the entire environmental area will grow in the coming years and that well-trained paralegals can help Fort Ord and other installations meet their obligations under the regulations.

In-House Training

Providing training to paralegals has been an important key to the Fort Ord program's success. The office schedules both on-the-job training and classroom instruction throughout each paralegal's career. The office also intends to start on-the-job training with rotations of new paralegals through all branches of OSJA during their first eighteen to twenty-four months with the office. Naturally, paralegals do a better job if they understand how their jobs fit in to the overall organization. Rotation will allow paralegals to benefit from exposure to several trainers in various legal specialties. In addition, cross training will provide greater depth within the paralegal ranks. Moreover, the availability of backup assistance, when needed, has enabled OSJA branches to handle workload surges comfortably. An early introduction to the spectrum of SJA office activities is a vital part of Fort Ord's training program.

Two paralegals administer a structured training program. These paralegal training coordinators seek to provide quality, low cost instruction to all paralegals. Within OSJA, attorneys or paralegals who are subject matter experts provide instruction in their areas of expertise. For example, OSJA instructors have given instruction on the topics of legal research, legal writing, and administration of justice.

The SJA also invites outside agencies to Fort Ord to conduct training, usually at no cost to the installation. The Internal Revenue Service, California Franchise Tax Board, Immigration and Naturalization Service, Monterey County Legal Services Corporation, and a representative of the Bankruptcy Court each have provided classes. When a paralegal decides to attend an off-post seminar, the attending paralegal is responsible for sharing information with the other paralegals. The OSJA also encourages paralegals to attend free seminars hosted by the local law school and bar association. In addition, teleconferencing promises to open up new opportunities for Army SJA offices to share ideas on a variety of topics, to include paralegal training.

Military paralegals have the opportunity to enroll in the Army's military paralegal program. That program consists of specified correspondence and resident courses. No equivalent program exists for civilian paralegals, whom the Army allows to enroll only in subcourses that relate directly to their jobs. The Fort Ord SJA office encourages each paralegal to earn a paralegal certificate. The Army cannot mandate or fund this type of pursuit, but the office can use civilian training money to fund college courses that directly relate to the paralegal's duties.

Conclusion

The solutions developed to solve identified TDA deficiencies have worked. Paralegal vacancies offering upward mobility are promoting considerable competition as applicants strive to become part of the OSJA team. As restructuring has taken place, the skill levels and productivity of SJA office support personnel increased dramatically. The program has gained momentum as SJA office personnel recognize the value of each paralegal's contributions. With the addition of capable legal paraprofessionals, attorneys have become better able to manage their growing case loads.

On 3 March 1990, Fort Ord selected Mrs. Debra G. Richards, a paralegal assigned to OSJA's Litigation and Claims Branch, as Fort Ord's Civilian of the Year. Her selection, from a field of 3000 Department of the Army civilian employees, underscored the success of the Fort Ord SJA office's program.

The management strategy of developing and maximizing paralegal contributions has produced a more powerful, productive organization. The results have been immensely satisfying to the commander, OSJA customers, and the paralegals' employers.

Guard and Reserve Affairs Items

Judge Advocate Guard and Reserve Affairs Department, TJAGSA

Update to 1991 Academic Year On-Site Schedule

LTC Steven J. Mura is the new Seattle, Washington On-Site action officer. His address is 2102 Young St., Bellingham, WA 98225. He can be reached at (206) 671-1796.

The action officer for the San Juan, Puerto Rico, On-Site is MAJ Charles E. Fitzwilliams-Ortiz. His address is Federal Office Bldg., Room # 101, Avenue Carlos Chardon, Hato Rey, Puerto Rico 00918. He can be reached at (809) 722-1550/1558.

CPT Buffy Roney is the new Los Angeles, California, On-Site action officer. Her address is 101 N. Robertson Blvd., Suite 204, Beverly Hills, CA 90211-2103. She can be reached at (213) 659-4672.

The location for the Wakefield, Massachusetts, On-Site is the Colonial Hilton, Wakefield, MA. The action officer is COL Gerald D'Avolio. His address is 4 Bancroft St., Lynnfield, MA 01940. He can be reached at (617) 523-4860.

The new phone number for MAJ Greg Davis, the Oklahoma City On-Site action officer, is (405) 528-4179. His new address is 3711 Classen Blvd., Oklahoma City, OK 73118. The location is still TBD.

COL Richard W. Breithaupt is the new Denver, Colorado, On-Site action officer. His address is: 8400 East Prentice Avenue, Suite 240, Englewood, CO 80111. His telephone number is: (303) 793-3100.

COL David L. Schreck, San Francisco On-Site action officer, has changed his address. His new address is: 50 Westwood Drive, Kentfield, CA 94904. Telephone number: (415) 557-3030 or (415) 461-3053.

Mandatory Removal Date

The Mandatory Removal Date (MRD) is the date when the Army removes a service member from active reserve service. The Army determines an individual's MRD by applying the guidance contained in AR 140-10, Chapter 7. This provision gives two basic ways to determine MRD: 1) length of service; and 2) age. The rules for removal of officers are as follows:

An officer in the grade of lieutenant colonel or below reaches the MRD thirty days after the date he or she completes twenty-eight years of commissioned service, or thirty days after his or her fifty-third birthday, whichever is earlier. A colonel reaches the MRD thirty days after the date he or she completes thirty years of commissioned service, or thirty days after his or her fifty-fifth birthday, whichever is earlier. Notwithstanding the MRD, however, the Army will not remove a colonel involuntarily prior to the fifth anniversary of his or her promotion to colonel. Warrant officers reach their MRDs at age sixty-two. Commissioned warrant officers, however, reach their MRDs at age sixty.

A number of exceptions apply to the MRD rules. For instance, the Army will not remove officers involuntarily if they have eighteen or nineteen years of qualifying federal service for retired pay. Instead, the Army will retain these officers until they have completed twenty years of service. *See* 10 U.S.C. § 1332 (1988). All federal service—not just commissioned service—counts toward the eighteen years of qualifying service. Qualifying federal service, however, does not include ROTC time except for time in the Simultaneous Membership Program.

Constructive credit does not count as qualifying service for computing an officer's MRD. Section 3353 of title 10, United States Code, authorizes constructive service credit for Reserve commissioned officers on active duty who have special professional experience or education in fields such as law or medicine. Although it counts in computing years of commissioned service for officers in grades above second lieutenant, and in computing an officer's total allowable years of federal commissioned service, federal law currently excludes constructive service credit from the computation of an officer's MRD.

Because the MRD may have a substantial effect on an officer's plans and finances, each officer should review his or her personnel record to ascertain the MRD reflected therein. Officers then should seek to have questionable MRDs explained or, if necessary, corrected. Dr. Mark Foley.

CLE News

1. Resident Course Quotas

The Judge Advocate General's School restricts attendance at resident CLE courses to those who have received allocated quotas. **If you have not received a welcome letter or packet, you do not have a quota.** Personnel may obtain quota allocations from local training offices, which receive them from the MACOMs. Reservists obtain quotas through their unit or, if they are

nonunit reservists, through ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132-5200. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOMs and other major agency training offices. To verify a quota, you must contact the Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22903-1781 (Telephone: AUTOVON 274-7115, extension 972-6307; commercial phone: (804) 972-6307).

2. TJAGSA CLE Course Schedule

1990

3-7 December: 8th Operational Law Seminar (5F-F47).

10-14 December: 38th Federal Labor Relations Course (5F-F22).

1991

7-11 January: 1991 Government Contract Law Symposium (5F-F11).

22 January-29 March: 124th Basic Course (5-27-C20).

28 January-1 February: 105th Senior Officer's Legal Orientation Course (5F-F1).

4-8 February: 26th Criminal Trial Advocacy Course (5F-F32).

25 February-8 March: 123d Contract Attorneys Course (5F-F10).

11-15 March: 15th Administrative Law for Military Installations (5F-F24).

18-22 March: 47th Law of War Workshop (5F-F42).

25-29 March: 28th Legal Assistance Course (5F-F23).

1-5 April: 2d Law for Legal NCO's Course (512-71D/E/20/30).

8-12 April: 9th Operational Law Seminar (5F-F47).

8-12 April: 106th Senior Officers Legal Orientation Course (5F-F1).

15-19 April: 9th Federal Litigation Course (5F-F29).

29 April-10 May: 124th Contract Attorneys Course (5F-F10).

8-10 May: 2d Center for Law and Military Operations Symposium (5F-F48).

13-17 May: 39th Federal Labor Relations Course (5F-F22).

20-24 May: 32d Fiscal Law Course (5F-F12).

20 May-7 June: 34th Military Judge Course (5F-F33).

3-7 June: 107th Senior Officers Legal Orientation Course (5F-F1).

10-14 June: 21st Staff Judge Advocate Course (5F-F52).

10-14 June: 7th SJA Spouses' Course.

17-28 June: JATT Team Training. 17-28 June: JAOAC (Phase VI).

8-10 July: 2d Legal Administrators Course (7A-550A1).

11-12 July: 2d Senior/Master CWO Technical Certification Course (7A-550A2).

22 July-2 August: 125th Contract Attorneys Course (5F-F10).

22 July-25 September: 125th Basic Course (5-27-C20).

29 July-15 May 1992: 40th Graduate Course (5-27-C22).

5-9 August: 48th Law of War Workshop (5F-F42).

12-16 August: 15th Criminal Law New Developments Course (5F-F35).

19-23 August: 2d Senior Legal NCO Management Course (512-71D/E/40/50).

26-30 August: Environmental Law Division Workshop.

9-13 September: 13th Legal Aspects of Terrorism Course (5F-F43).

23-27 September: 4th Installation Contracting Course (5F-F18).

3. Civilian Sponsored CLE Courses

February 1991

3-4: ABA, ABA Taxation Section Annual Advanced Study Sessions, Lake Buena Vista, FL.

6-8: ALIABA, Employment Discrimination and Civil Rights Actions, San Francisco, CA.

10-15: AAJE, Constitutional Criminal Procedure, Scottsdale, AZ.

10-15: AAJE, Evidence, Scottsdale, AZ.

11-12: PLI, Technology Licensing and Litigation, San Francisco, CA.

11-15: ESI, Federal Contracting Basics, Los Angeles, CA.

11-15: GWU, Administration of Government Contracts, Washington, D.C.

12-15: ESI, Preparing and Analyzing Statements of Work and Specifications, Washington, D.C.

13-15: ALIABA, Basic Estate and Gift Taxation and Planning, Park City, UT.

14-16: ALIABA, Environmental Law, Washington, D.C.

21-23: ALIABA, Advanced Estate Planning Techniques, Maui, HI.

21-23: ALIABA, Qualified Plans, PCs, and Welfare Benefits, Scottsdale, AZ.

22: ALIABA, Effective Legal Negotiation and Settlement, New Orleans, LA.

26-1 March: ESI, Competitive Proposals Contracting, Arlington, VA.

28-1 March: PLI, Indenture Trustees and Bondholders: Defaulted Bonds, New York, NY.

28-1 March: ALIABA, Southern Securities Institute, Tampa, FL.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the August 1990 issue of *The Army Lawyer*.

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	Reporting Month
Alabama	31 January annually
Arkansas	30 June annually
Colorado	31 January annually
Delaware	On or before 31 July annually every other year
Florida	Assigned monthly deadlines every three years
Georgia	31 January annually
Idaho	1 March every third anniversary of admission
Indiana	1 October annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	30 days following completion of course
Louisiana	31 January annually
Minnesota	30 June every third year
Mississippi	31 December annually
Missouri	30 June annually
Montana	1 April annually
Nevada	15 January annually
New Jersey	12-month period commencing on first anniversary of bar exam
New Mexico	For members admitted prior to 1 January 1990 the initial reporting year shall be the year ending September 30, 1990. Every such member shall receive credit for carryover credit for 1988 and for approved programs attended in the period 1 January 1989 through 30 September 1990. For members admitted on or after 1 January 1990, the initial reporting year shall be the first full reporting year following the date of admission.
North Carolina	12 hours annually
North Dakota	1 February in three-year intervals
Ohio	24 hours every two years
Oklahoma	On or before 15 February annually
Oregon	Beginning 1 January 1988 in three-year intervals
South Carolina	10 January annually
Tennessee	31 January annually
Texas	Birth month annually
Utah	31 December of 2d year of admission
Vermont	1 June every other year
Virginia	30 June annually
Washington	31 January annually
West Virginia	30 June annually
Wisconsin	31 December in even or odd years depending on admission
Wyoming	1 March annually

For addresses and detailed information, see the July 1990 issue of *The Army Lawyer*.

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year, TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are not able to attend courses in their practice areas. The School receives many requests each year for these materials. However, because outside distribution of these materials is not within the School's mission, TJAGSA does not have the resources to provide publications to individual requestors.

To provide another avenue of availability, the Defense Technical Information Center (DTIC) makes some of this material available to government users. An office may obtain this material in two ways. The first way is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per

fiche copy. Overseas users may obtain one copy of a report at no charge. Practitioners may request the necessary information and forms to become registered as a user from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314-6145, telephone (202) 274-7633, AUTOVON 284-7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. DTIC will provide information concerning this procedure when a practitioner submits a request for user status.

DTIC provides users biweekly and cumulative indices. DTIC classifies these indices as a single confidential document, and mails them only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and *The Army Lawyer* will publish the relevant ordering information, such as DTIC numbers and titles. The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC; users must cite them when ordering publications.

Contract Law

AD B100211 Contract Law Seminar Problems/JAGS-ADK- 86-1 (65 pgs).

AD B136337 Contract Law, Government Contract Law Deskbook Vol 1/JAGS-ADK-89-1 (356 pgs).

AD B136338 Contract Law, Government Contract Law Deskbook, Vol 2/JAGS-ADK-89-2 (294 pgs).

*AD B144679 Fiscal Law Course Deskbook/JA-506-90 (270 pgs).

Legal Assistance

AD B092128 USAREUR Legal Assistance Handbook/JAGS- ADA-85-5 (315 pgs).

AD B116103 Legal Assistance Preventive Law Series/JAGS-ADA-87-10 (205 pgs).

AD B116101 Legal Assistance Wills Guide/JAGS-ADA-87-12 (339 pgs).

AD B136218 Legal Assistance Office Administration Guide/JAGS-ADA-89-1 (195 pgs).

AD B135453 Legal Assistance Real Property Guide/JAGS-ADA-89-2 (253 pgs).

AD B135492 Legal Assistance Consumer Law Guide/JAGS-ADA-89-3 (609 pgs).

*AD A226160 Legal Assistance Guide: Soldiers' and Sailors' Civil Relief Act/JA-260-90 (85 pgs).

AD B141421 Legal Assistance Attorney's Federal Income Tax Guide/JA-266-90 (230 pgs).

*AD B147096 Legal Assistance Guide: Office Directory/JA-267-90 (178 pgs).

*AD A226159 Model Tax Assistance Program/JA-275-90 (101 pgs).

*AD B147389 Legal Assistance Guide: Notarial/JA-268-90 (134 pgs).

*AD B147390 Legal Assistance Guide: Real Property/JA-261-90 (294 pgs).

Administrative and Civil Law

AD B139524 Government Information Practices/JAGS-ADA-89-6 (416 pgs).

AD B139522 Defensive Federal Litigation/JAGS-ADA-89-7 (862 pgs).

*AD B145359 Reports of Survey and Line of Duty Determinations/ACIL-ST-231-90 (79 pgs).

AD A199644 The Staff Judge Advocate Officer Manager's Handbook/ACIL-ST-290.

*AD B145360 Administrative and Civil Law Handbook/JA-296-90-1 (525 pgs).

*AD B145704 AR 15-6 Investigations: Programmed Instruction/JA-281-90 (48 pgs).

Labor Law

*AD B145934 The Law of Federal Labor-Management Relations/JA-211-90 (433 pgs).

*AD B145705 Law of Federal Employment/ACIL-ST-210- 90 (458 pgs).

Developments, Doctrine & Literature

AD B124193 Military Citation/JAGS-DD-88-1 (37 pgs.)

Criminal Law

AD B100212 Reserve Component Criminal Law PEs/JAGS-ADC-86-1 (88 pgs).

AD B135506 Criminal Law Deskbook Crimes & Defenses/JAGS-ADC-89-1 (205 pgs).

AD B135459 Senior Officers Legal Orientation/JAGS- ADC-89-2 (225 pgs).

*AD B137070 Criminal Law, Unauthorized Absences/JAGS-ADC-89-3 (87 pgs).

AD B140529 Criminal Law, Nonjudicial Punishment/JAGS-ADC-89-4 (43 pgs).

AD B140543 Trial Counsel & Defense Counsel Handbook/JAGS-ADC-90-6 (469 pgs).

Reserve Affairs

AD B136361 Reserve Component JAGC Personnel Policies Handbook/JAGS-GRA-89-1 (188 pgs).

The following CID publication is also available through DTIC:

AD A145966 USACIDC Pam 195-8, Criminal Investigations, Violation of the USC in Economic Crime Investigations (250 pgs).

REMINDER: publications are for government use only.

*Indicates new publication or revised edition.

2. Regulations & Pamphlets

Listed below are new publications and changes to existing publications.

Number	Title	Date
AR 37-104-1	Payment of Retired Pay to Members and Former Members of the Army	16 Aug 90
AR 600-8-1	Reassignment	1 Oct 90
AR 635-40	Physical Evaluation for Retention, Retirement, or Separation	1 Sep 90
CIR 11-90-3	Army Management Control Plan	1 Oct 90
JFTR	Joint Federal Travel Regulations, Vol. 2, Civilian, Interim Change 299	1 Sep 90
PAM 25-69	List of Approved Recurring Management Information Requirements	30 Jul 90
PAM 740-1	Instructional Guide for Basic Military Preservation and Packing	29 Jun 90
UPDATE	Financial Update #13	31 Jul 90

3. OTJAG Bulletin Board System

Numerous TJAGSA publications are available on the OTJAG Bulletin Board System (OTJAG BBS). Users can sign on the OTJAG BBS by dialing (703) 693-4143 with the following telecommunications configuration: 2400 baud; parity-none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100 terminal emulation. Once logged on, the system will greet the user with an opening menu. Members need only answer the prompts to call up and download desired publications. The system will ask new users to answer several questions and will then instruct them that they can use the OTJAG BBS after they receive membership confirmation, which takes approximately forty-eight hours. A future issue of *The Army Lawyer* will contain information on programming communications software to work with the OTJAG BBS, as well as information on new publications and materials available through the OTJAG BBS.

U.S. Postal Service

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Full Name	Complete Mailing Address
Headquarters, Department of the Army	Washington, D.C. 20310

8. Known Bondholders, Mortgagees, and Other Security Holders Owning or Holding 1 Percent or More of Total Amount of Bonds, Mortgages or Other Securities *(If there are none, so state)*

Full Name	Complete Mailing Address
None	

9. For Completion by Nonprofit Organizations Authorized To Mail at Special Rates *(DMM Section 423.12 only)*
The purpose, function, and nonprofit status of this organization and the exempt status for Federal income tax purposes *(Check one)*

☐ (1) Has Not Changed During Preceding 12 Months

☐ (2) Has Changed During Preceding 12 Months

(If changed, publisher must submit explanation of change with this statement.)

10. Extent and Nature of Circulation *(See instructions on reverse side)*	Average No. Copies Each Issue During Preceding 12 Months	Actual No. Copies of Single Issue Published Nearest to Filing Date
A. Total No. Copies *(Net Press Run)*	7823	7892
B. Paid and/or Requested Circulation 1. Sales through dealers and carriers, street vendors and counter sales	0	0
2. Mail Subscription *(Paid and/or requested)*	200	200
C. Total Paid and/or Requested Circulation *(Sum or 10B1 and 10B2)*	200	200
D. Free Distribution by Mail, Carrier or Other Means Samples, Complimentary, and Other Free Copies	7535	7609
E. Total Distribution *(Sum of C and D)*	7735	7809
F. Copies Not Distributed 1. Office use, left over, unaccounted, spoiled after printing	88	83
2. Return from News Agents	0	0
G. TOTAL *(Sum of E, F1 and 2—should equal net press run shown in A)*	7823	7892

11. I certify that the statements made by me above are correct and complete

Signature and Title of Editor, Publisher, Business Manager, or Owner

Daniel P. Shaver

Daniel P. Shaver, Captain, U.S. Army, Editor

PS Form 3526, Feb. 1989 *(See instructions on reverse)*

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